TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 127

STANDARD OIL COMPANY OF NEW JERSEY, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

(29,917)

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vs.

SOUTHERN PACIFIC COMPANY AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1] **UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

In the Matter of the Petition of STANDARD OIL COMPANY (NEW JERSEY), Owner of the Steamship Cushing, for Exemption from or Limitation of Liability

DOCKET ENTRIES

1919.
March 14. Filed Petition.
July 1. " report of claims.
July 8. " Answer & stipulation for costs (HBE).
July 23. " answer & stipulation for costs (Cohen).
Aug. 27. " answer (B. V. M. & F.).
Dec. 4. " & entered order noting defaults.
Dec. 15. " " " " amending order noting defaults.

1920.
May 17. Case tried, L. Hand, J.
June 2. Argued & submitted.

[fol. 2]

June 26. Filed Opinion (L. Hand).

1922.
Nov. 8. Order of consolidation & substitution James C. Davis for Walker D. Hines.
Nov. 23. Order of consolidation.
Nov. 28. Final Decree.
Dec. 28. Filed Notice of Appeal.

1923.
Jan. 18. " Assignments of error.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Standard Oil Company, (New Jersey), as owner of the steamship Cushing, in a cause of exemption from or limitation of liability, civil and maritime, alleges as follows:

First. At all the times hereinafter mentioned the petitioner was and still is a corporation organized and existing under the laws of the

State of New Jersey, having an office and principal place of business at No. 25 Broadway, in the Borough of Manhattan, City of New York, and at the times hereinafter mentioned was the sole owner of [fol. 4] the steamship Cushing, her engines, boilers, tackle, apparel and furniture, and all the appurtenances thereto.

Second. The Cushing is a single screw steel tank steamship, constructed for carrying oil in bulk, of 6,894 gross tonnage, 4,320 net tonnage, 428 feet long, 54.7 feet in beam, and 31 feet moulded depth of hold, built in 1903 by Palmers Company, Ltd., Newcastle, England, and fitted for the use of oil as fuel. At all the times hereinafter mentioned she was tight, staunch, strong and in all respects seaworthy, and fully and efficiently equipped. She was fully and properly officered and manned.

Third. On August 17, 1918, at about 2 o'clock in the afternoon, the steamship Cushing left the port of New York in ballast bound for Beaumont, Texas. Upon her departure from the port of New York as aforesaid, the Cushing had no cargo or passengers on board. The Cushing, after passing out of the entrance to New York harbor, shaped her course in a southerly direction and proceeded upon her voyage without any trouble, incident or mishap, until the early morning of August 19, 1918, when she had reached approximately Latitude 34° 45′ North and Longitude 75° 49′ West, and was in a position approximately Southwest of Diamond Shoal Lightship Buoy. At that time she was steering a southwesterly course. The night was cloudy. In accordance with orders received from the United States [fol. 5] Naval Authorities, which orders she was compelled to obey, the Cushing was not showing any navigation lights. The second officer was on the bridge in charge of the navigation. A lookout was stationed in the crow's nest, and another lookout was stationed on the forecastle-head. The officers, seamen and lookouts were all of them duly attending to their respective duties, and a full watch was in attendance. Shortly before 1 o'clock on the morning of said day, a ship without lights which afterwards proved to be the American steamship Proteus was reported by the lookout. The Proteus when first sighted bore on the starboard bow of the Cushing, and was seen to be approaching on a course substantially parallel to that of the Cushing, and which would enable the two vessels, to pass starboard to starboard by a good margin of safety.

The Proteus, for a time, continued to hold her course as first seen and appeared to be complying with the situation which called for a starboard to starboard passage. She was then seen to alter her course sharply to starboard, apparently at full speed, and under a hard aport helm. Shortly thereafter she was heard to blow a signal of one blast, but she still failed to display any navigation lights. The Cushing immediately put her helm hard aport, put her engines full speed astern, sounded a signal of three blasts, and switched on her side lights. The Proteus continued to swing sharply without any apparent change of speed, until she was across the bow of the Cushing, [fol. 6] and the two vessels came together, the bow of the Cushing striking the Proteus about amidships.

Fourth. The headway of the Proteus carried her clear, and the Cushing then stood by in communication with her while it was found that the Proteus was filling rapidly. The boats of the Proteus were lowered, and her master, officers, crew and passengers were transferred to the Cushing. The Proteus, sank about one hour after the collision. The Cushing then got under way towards Norfolk, and it was subsequently reported to her master that one coal passer of the crew of the Proteus had jumped overboard from the latter vessel after the collision and had been lost. The Cushing arrived in Lynnhaven Roads on August 20, at 1:30 a. m., and anchored for the night. At 10 o'clock on the morning of the following day, August 21, a pilot arrived on board and the Cushing proceeded to Hampton Roads where she arrived about 1 o'clock in the afternoon of said day, and the survivors were landed safely.

Fifth. The collision aforesaid and the loss, damage, injury and destruction resulting therefrom were occasioned and incurred without the privity of knowledge of the petitioner herein, and were not caused or contributed to by any negligence or fault on its part or on the part of those in charge of the steamship Cushing, or on the part of any persons for whom the petitioner herein was or is responsible, but were due solely to and caused wholly by the negligence of the [fol. 7] steamship Proteus and those in charge of her in the following respects among others:

1. She was not in charge of competent persons.

2. She was not maintaining a proper and efficient lookout.

3. She was not fully equipped and was not manned and officered with a sufficient number of competent men.

4. She failed to discover the presence of the Cushing as promptly as she should have done.

5. She did not hold her course so as to pass the Cushing starboard to starboard, although the vessels when first sighted by each other were in a situation which called for a starboard passage.

6. She negligently ported her helm in an attempt to cross the bow of the Cushing.

7. She failed to give any reasonable whistle signals as warning of her intended navigation.

8. She failed to heed the signals from the Cushing and did not seasonably stop and reverse her engines or take any other steps as she might have done to avoid the collision or mitigate the resulting damages.

[fol. 8] Sixth. Proceedings have already been brought against the petitioner and claims have been presented to it for damages alleged to have been sustained by reason of the loss of the steamship Proteus, her cargo, personal effects and equipment, and also for damages for

personal injuries alleged to have been sustained by persons on board the Proteus as a result of the aforesaid collision.

1. An action has been commenced in the New York Supreme Court, New York County against your petitioner herein and Southern Pacific Company, defendants, by Delores Francis, plaintiff, to recover damages claimed in the sum of $10,000. The attorneys for the plaintiff in the said action are Cohen Brothers, whose office and post-office address is No. 35 Wall Street, Borough of Manhattan, City of New York.

2. An action has been commenced in the New York Supreme Court, New York County, against your petitioner by D. W. Roberts, John E. Roberts and Leo G. Carter, copartners trading as Roberts, Carter & Company, claiming damages in the sum of $180,000 for alleged loss of cargo on the Proteus. The attorneys for the plaintiff in said action are Harrington, Bigham & Englar, whose office and post-office address is No. 64 Wall Street, Borrough of Manhattan, City of New York.

3. A suit in personam has been commenced in the United States [fol. 9] District Court for the Southern District of New York in admiralty against the Standard Oil Company and Southern Pacific Lines, by Mrs. Bonita Hearn, claiming damages in the sum of $11,000 for baggage and personal effects alleged to have been lost on board the Proteus. The attorney for the libelant in said suit is Henry E. Cohen, whose office and post office address is No. 288 Grand Street, Borough of Manhattan, City of New York.

4. A libel in rem has been filed in the United States District Court for the Southern District of New York against the Steamship Cushing, by Southern Pacific Company, owner of the Proteus, claiming damages in the sum of $1,850,000. The proctors for the libelant in said suit are Burlingham, Veeder, Masten & Fearey, whose office and post office address is No. 27 William Street, Borough of Manhattan, City of New York.

5. A libel in rem has been filed in the United States District Court for the Southern District of New York, against the steamship Cushing, by W. Roberts, John E. Roberts and Leo G. Carter, copartners trading as Roberts, Carter & Company, claiming damages in the sum of $180,000, for cargo alleged to have been lost on the Proteus. The proctors for the libelant in said suit are Harrington, Bigham & Englar, whose office and post-office address is No. 64 Wall Street, Borough of Manhattan, City of New York.

[fol. 10] 6. A claim has been presented to your petitioner herein on behalf of the wife, son and daughter of one Remer Armstrong, for the alleged loss of two trunks valued at $100 each, and for the alleged loss of other personal property said to amount to $125. Mr. Armstrong's address is understood to be No. 717 West Third Street, Wilmington, Delaware.

Your petitioner expects that other claims will be presented against it and that other suits will be begun by persons who sustained loss by

reason of the said collision. The demands already made against the petitioner on behalf of the various claimants amount to more than $2,231,000.

Seventh. The value of the steamship Cushing at the termination of said voyage after the collision with the Proteus amounted to the sum of $1,235,000. The interest of the petitioner in the steamship Cushing at the termination of the voyage on which the aforesaid collision occurred, therefore, was $1,235,000. There was not any freight earned or pending on the said voyage.

Eighth. The petitioner herein claims exoneration from liability for the loss of the steamship Proteus and for all loss, damage, injuries and destruction resulting from the aforesaid collision and in the alternative it claims the benefit of the limitation of liability provided in Sections 4283, 4284, 4285 and 4286 of the Revised [fol. 11] Statutes of the United States, and in the statutes amendatory thereto, and to that end is ready and willing to give a stipulation with sureties for the payment into court of the amount or value of its interest in the steamship Cushing at the termination of the voyage on which the collision occurred as set forth above, whenever the same shall be ordered as provided by the aforesaid statutes, by General Rule No. 54 in Admiralty, and by the rules and practice of this court.

Ninth. There are no demands, unsatisfied liens or claims of lien against the steamship Cushing or her appurtenances, nor any suits pending thereon, so far as known to the petitioner herein, except as set forth above.

Tenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, petitioner prays that the court will cause an appraisement to be made of the amount of value of its interest in the said steamship Cushing in pursuance to the statutes of the United States aforesaid and will make an order for the giving of a stipulation with sureties for the payment thereof into court whenever the same shall be ordered by the court, and will cause a monition to be issued to all persons claiming damages for all and any such loss, damage, injury, destruction or death caused by or resulting from the collision afore- [fol. 12] said, citing them to appear before the commissioner to be appointed by the court, and to make due proof of their respective claims at or before a certain time to be fixed by the writ, and also to appear and answer the allegations of this petition according to law and the practice of this court; and that the court, on the filing of such a stipulation as may be deemed to be proper or on the payment into court of the appraised value of the interest of the petitioner in the said steamship Cushing, will issue its injunction restraining the prosecution of the suits and actions heretofore set forth and enumerated, and the commencement or prosecution hereafter of any suit, action or legal proceeding of any nature or description whatever against the petitioner herein, except in the present proceeding, in respect of any claim or claims arising out of the aforesaid collision.

The petitioner further prays that the court will adjudge that the petitioner is not liable to any extent for any loss, damage, injury, destruction or death arising from the aforesaid collision or in the alternative, that if the petitioner be liable therefor, its liability may be limited to the amount of the value of its interest in the steamship Cushing as appraised, and that the moneys paid or secured to be paid as aforesaid be divided pro rata among such claimants as may duly prove their claims before the commissioner to be appointed herein, saving to all parties any priority to which they may be entitled; and [fol. 13] the petitioner further prays that it may have such further or other relief as may be just in the premises.

Kirlin, Woolsey & Hickox, Proctors for Petitioner.

Office & Post-Office Address: 7 William Street, Borough of Manhattan, City of New York.

[fol. 14] Jurat showing the foregoing was duly sworn to by F. H. Bedford omitted in printing.

[fol. 15] IN UNITED STATES DISTRICT COURT

ANSWER OF SOUTHERN PACIFIC COMPANY

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of Southern Pacific Company as owner of the steamship Proteus, and Walker D. Hines, as Director General of Railroads to the petition of Standard Oil Company (New Jersey) as owner of the Steamship Cushing, in a cause of limitation of liability alleges as follows:

First. Respondents admit the allegations of the first article of the petition.

Second. Upon information and belief, respondents deny that the Cushing was fully and properly officered and manned and they deny any knowledge or information sufficient to form a belief as to the other allegations of the second article of the petition.

Third. Respondents admit that the Cushing was not showing any lights, that the Cushing and the Proteus were approaching on substantially parallel courses; that the Proteus under a hard-a-port wheel directed her course to starboard and sounded a signal of one blast and that the bow of the Cushing struck the port side of the Proteus [fol. 16] about amidships. Respondents deny that the night was cloudy; that the Cushing's officers, seamen and lookouts were all duly attending to their duties; that the Proteus bore on the Cushing's starboard bow and was on a course which would enable the two vessels to pass starboard to starboard by a margin of safety; that the Proteus complied with a situation which called for a starboard

to starboard passage and that the Cushing put her helm hard-a-port, her engines astern and sounded three blasts.

Further answering, respondents deny any knowledge or information sufficient to form a belief as to the other allegations of the third article of the petition.

Fourth. Respondents deny any knowledge or information sufficient to form a belief as to when the Cushing arrived in Lynnhaven Roads, when the pilot came on board, and when she proceeded to and arrived at Hampton Roads, and they admit the other allegations of the fourth article of the petition.

Fifth. Respondents admit that the collision between the Cushing and the Proteus and the resulting damage were occasioned and incurred without the privity or knowledge of the petitioner, Standard Oil Company (New Jersey), and they deny the other allegations of the fifth article of the petition.

[fol. 17] Sixth. Respondents admit those allegations of the sixth article of the petition in respect of the suits of Delores Francis and Southern Pacific Company, and deny any knowledge or information sufficient to form a belief as to the other allegations of said article.

Seventh. Respondents deny any knowledge or information sufficient to form a belief as to the allegations of the seventh article of the petition.

Eighth. Respondents admit the allegations of the eighth article of the petition.

Ninth. Respondents deny any knowledge or information sufficient to form a belief as to the allegations of the ninth article of the petition.

Tenth. Respondents admit the jurisdiction, and deny the other allegation of the tenth article of the petition.

Eleventh. Further answering respondents allege that the Proteus was a steel screw steamship of 4,836 tons gross, 3,006 tons net register, 390.8 feet long and 48.3 feet beam. She was owned by respondent, Southern Pacific Company, and in August, 1917, was being operated by the Director General of Railroads, pursuant to the President's proclamation of December 26, 1917.

The Proteus left New Orleans August 14, 1918, bound for New York with passengers and general cargo. About 9.45 p. m. of the [fol. 18] 18th, she passed Lookout Shoal Lightship and set her course for Diamond Shoal Gas Buoy, N. 50° E true. The weather was clear and the moon was shining, although at times obscured by clouds.

The Proteus was under the command of a competent master and had a full crew of experienced and competent officers and men. By Government orders, she was running without lights. She was under full speed, making about 13½ knots. At midnight of the 18th, the second officer went on the bridge and took charge of her navigation;

a junior officer was also on the bridge; a quartermaster was at the wheel; and a sharp lookout was kept from the forecastlehead. The master was in the chart room and came out before the collision hereinafter described.

About 12:45 a. m. of the 19th, while the Proteus was on a course N. 50° E true and about thirty miles below Diamond Shoal Gas Buoy, a vessel, without lights, which proved to be the camouflaged steamship Cushing, was observed a fraction of a point on the port bow and on a course opposite that of the Proteus at a distance estimated at from 1¼ to 1½ miles. The Proteus immediately put her helm hard-a-port in order to pass port to port. Instead of porting, the Cushing starboarded and closed in on the Proteus. The Proteus sounded a signal of one blast, indicating that she was directing her course to starboard. Both vessels kept on, the Proteus under a port and the Cushing under a starboard helm. The Proteus kept her [fol. 19] engines at full speed and her helm hard-a-port. The Cushing made no attempt to avoid collision, and her stem struck the Proteus on the port side about amidships at about right angles, cutting several feet into the Proteus's side and flooding her fireroom and engine-room.

A few seconds before the collision, the Cushing switched on her side lights. The Proteus sent out a S. O. S. call and her boats were lowered and the passengers and crew taken aboard the Cushing. Three members of the crew jumped overboard; two of these were rescued, and one was lost. The steamer sank and became a total loss. None of the cargo was saved nor any of the personal effects of the passengers or crew.

The collision occurred shortly before 1 a. m., in latitude 34° 46′ North, and longitude 75° 48′ West.

Twelfth. The collision and consequent damage were not caused or contributed to by any negligence on the part of the respondents or either of them, or of the master, officers or crew of the Proteus, but were due solely to the negligence of the Cushing and those in charge of her in the following respects, among others:

1. She was not under the charge of a competent person.

2. She did not keep a good lookout.

3. She starboarded her helm instead of porting.

[fol. 20] 4. She failed to sound any signals.

5. She failed to switch on her lights when that was essential to avoid collision.

6. She failed to take any precautions to advise the Proteus of her presence.

7. She failed to slow, stop or reverse her engines.

8. She failed to do anything to avoid collision, after risk of collision was or should have been apparent.

All and singular the premises are true.

Wherefore respondents pray that petitioner's prayer for exoneration from liability for the loss and damage resulting from the facts set forth in the petition be denied, and that the petitioner be held solely liable for the damage sustained as a result of the collision to the extent of the value of the steamship Cushing and her pending freight and passage moneys, if any, with interest from the date of the accident, and that the respondents herein be granted such other and further relief as may be just and proper.

Burlingham, Veeder, Masten & Fearey, Proctors for Respondent.

[fols. 21–32] Jurat showing the foregoing was duly sworn to by Hugh Neill omitted in printing.

[fol. 33] In United States District Court, Southern District of New York

In the Matter of the Petition of Southern Pacific Company, as Owner of the Steamship Proteus, and Walker D. Hines, as Director General of Railroads, in a Cause of Limitation of Liability.

Docket Entries

1919.

July 21. Filed Petition.
Sept. 18. Filed Answer & Stipulation for costs (Cohen).
Oct. 23. " Answer & Stipulation for costs (K. W. & H.).
Oct. 27. " Report of claims.

1920.

May 17. Case tried L. Hand.
June 2. Argued & submitted.
June 26. Filed opinion.
Nov. 8. Order of consolidation with 68/29.

1922.

Nov. 28. Filed final Decree.

1923.

Jan. 27. " Notice of Appeal.
Jan. 27. " Assignments of Error.

[fol. 34] IN UNITED STATES DISTRICT COURT

PETITION

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The petition of Southern Pacific company, as owner of the Steamship Proteus, and Walker D. Hines, as Director General of Railroads, in a cause of limitation of liability, civil and maritime, alleges as follows:

First. At the times hereinafter mentioned, the petitioner Southern Pacific Company was, and is now, a Kentucky corporation having a place of business in the City of New York within this district and the owner of the steamship Proteus, a steel, screw vessel of 4836 tons gross, 3006 tons net register, 390.8 feet long and 48.3 feet beam. She was built by Newport News Shipbuilding Company at Newport News, Virginia, and launched in 1900. Until the collision hereinafter described, she was tight, staunch, strong and in all respects seaworthy.

Second. On or about August 29, 1916, the Congress of the United States passed and the President approved "An Act Making Appropriation for the Support of the Army for the Fiscal Year ending June 30, 1917, and for Other Purposes," and provided in section 1 thereof that the President in time of war was empowered through the Secretary of War to take possession and as-ume control of any system or [fol. 35] systems of transportation or any part thereof, and to utilize the same to the exclusion as far as might be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as might be needful or desirable..

Pursuant to said Act of Congress of August 29, 1916, the President of the United States on December 26, 1917, duly issued a proclamation whereby he took possession and assumed control at 12 o'clock noon on December 28, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled system of coastwise and inland transportation, engaged in general transportation for the purpose stated in said proclamation, and by said proclamation appointed and designated William G. McAdoo as Director General of Railroads to exercise possession, control, operation and utilization of such transportation systems.

Third. By said proclamation of December 26, 1917, the President took possession and assumed control at 12 o'clock noon December 28, 1917, of the petitioner Southern Pacific Company and its property, including its system of coastwise transportation known as Southern Pacific Company (Atlantic Steamship Lines), of which [fol. 36] said steamship Proteus was a part; and said steamship was thereafter and until her loss as hereinafter set forth in the posses-

sion and control of and was operated and utilized by said William G. McAdoo as Director General of Railroads, who named, victualled and navigated said vessel at his own expense and by his own procurement, and was a charterer thereof within the meaning of section 4286 of the Revised Statutes. The principal office and place of business of the Director General of Railroads is in the City of Washington, District of Columbia. On January 11, 1919, the petitioner Walker D. Hines succeeded said William G. McAdoo as Director General of Railroads and has continued to be and is now Director General of Railroads.

Fourth. The Proteus left New Orleans August 14, 1918, bound for New York, with passengers and general cargo. About 9.45 p. m. of the 18th, she passed Lookout Shoal Lightship and set her course for Diamond Shoal Gas Buoy, N. 50° E. true. The weather was clear and the moon was shining, although at times obscured by clouds.

The Proteus was under the command of a competent master and had a full crew of experienced and competent officers and men. By Government orders, she was running without lights. She was under full speed, making about 13½ knots. At midnight of the 18th, the second officer went on the bridge and took charge of her navigation; a junior officer was also on the bridge; a quartermaster was at the wheel; and a sharp lookout was kept from the forecastlehead. [fol. 37] The master was in the chart room and came out before the collision hereinafter described.

About 12:45 a. m. of the 19th, while the Proteus was on a course N. 50° E. true and about thirty miles below Diamond Shoal Gas Buoy, a vessel without lights, which proved to be the camouflaged steamship Cushing, was observed a fraction of a point on the port bow and on a course opposite that of the Proteus at a distance estimated at from 1¼ to 1½ miles. The Proteus immediately put her helm hard-aport in order to pass port to port. Instead of porting, the Cushing starboarded and closed in on the Proteus. The Proteus sounded a signal of one blast, indicating that she was directing her course starboard. Both vessels kept on, the Proteus under a port and the Cushing under a starboard helm. The Proteus kept her engines at full speed and her helm hard-aport. The Cushing made no attempt to avoid collision, and her stem struck the Proteus on the port side about amidships at about right angles, cutting several feet into the Proteus' side and flooding her fire-room and engine-room.

A few seconds before the collision, the Cushing switched on her side lights. The Proteus sent out a S. O. S. call and her boats were lowered and the passengers and crew taken aboard the Cushing. Three members of the crew jumped overboard, two of these were rescued, and one was lost. The steamer sank and became a total loss. None of the cargo was saved nor any of the personal effects of the passengers or crew.

[fol. 38] The collision occurred shortly before 1 a. m. in latitude 34° 46′ North, and longitude 75° 48′ West.

Fifth. The collision and consequent damage were occasioned and incurred without the privity or knowledge of the petitioners, and were not caused or contributed to by any negligence on the part of the petitioners or the master, officers or crew of the Proteus, but was due solely to the negligence of the Cushing and those in charge of her in the following respects, among others:

1. She was not under the charge of a competent person.

2. She did not keep a good lookout.

3. She starboarded her helm instead of porting.

4. She failed to sound any signals.

5. She failed to switch on her lights when that was essential to avoid collision.

6. She failed to take any precautions to advise the Proteus of her presence.

7. She failed to slow, stop or reverse her engines.

8. She failed to do anything to avoid collision after risk of collision was or should have been apparent.

[fol. 39] Sixth. The Proteus was a total loss, and nothing whatever was saved from the wreck. There was no pending freight, and the passage moneys of the Proteus on said voyage were $308.07. The entire aggregate value of the interest of the petitioners and of both of them in said steamship Proteus and her pending freight and passage moneys does not exceed $308.07.

Seventh. Proceedings have already been brought against the petitioner Southern Pacific Company, and claims have been presented for damages alleged to have been sustained by reason of said collision and loss of the Proteus.

1. An action has been brought in the New York Supreme Court, New York County against the petitioner Southern Pacific Company and Standard Oil Company as defendants, by Delores Francis, to recover damages claimed in the sum of $10,000. The attorneys for the plaintiff in said action are Cohen Brothers, whose office and post-office address is No. 35 Wall Street, Manhattan, New York City.

2. A suit in personam has been brought in the United States District Court for the Southern District of New York in admiralty against the petitioner Southern Pacific Company and Standard Oil Company by Mrs. Bonita Hearn, claiming damages in the sum of $11,000 for baggage and personal effects alleged to have been lost on board the Proteus. The attorney for the libellant in said suit [fol. 40] is Henry Cohen, whose office and post-office address is No. 288 Grand Street, Manhattan, New York City.

3. Many other claims have been presented as set forth in "Schedule A" annexed to this petition and made a part hereof.

Your petitioners expect that other claims will be presented against them, and that other suits will be begun by persons who sustained loss by reason of said collision. The demands already made on said petitioners by reason of said collision amount to more than $2,250,000.

Eighth. The petitioners claim exemption from liability for the losses, damages, injuries and destruction occasioned or incurred by the collision and sinking aforesaid, and for the claim for damages that have been made or hereafter may be made, and they and each of them allege that they have valid defenses thereto. They further claim the benefit of the limitation of liability provided in sections 4283–4286 of the Revised Statutes of the United States, and the various statutes supplemental thereto and amendatory thereof, and to that end are ready and willing to give a stipulation with sufficient surety for the payment into Court of the amount or value of their interest in the steamship Proteus and her pending freight whenever the same shall be ordered, as provided by said statutes, Supreme Court Rule 54 in Admiralty, and the rules and practice of this Court.

[fol. 41] Ninth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore the petitioners pray:

1. That the Court causes due appraisal to be made of the amount or value of their interest in the steamship Proteus and of her pending freight and passage moneys for the aforesaid voyage.

2. That the Court make an order directing the petitioners to file a stipulation with surety to be approved by the Court, for the payment into Court of the amount of the petitioners' said interest, whenever the Court shall so order.

3. That the Court make an order directing the issuance of a monition to all persons claiming damages for all or any loss, damage or injury caused by or resulting from the accident aforesaid, citing them to appear before a Commissioner to be named by the Court in said order, and make due proof of their respective claims, and also to appear and answer the allegations of this petition, according to the law and practice of this Court, at or before a certain time to be fixed by said monition.

4. That the Court make an order directing that on the giving of such stipulation as may be determined to be proper, or of an ad in-
[fol. 42] terim stipulation, an injunction shall issue, restraining the prosecution of the proceedings mentioned in the Ninth article hereof, and also restraining the commencement or prosecution hereafter in this or any other jurisdiction of any suit, action or legal proceeding at law, in equity, or in admiralty of any nature or description whatever, except in the present proceeding, against the petitioners, or

either of them, in respect of any claim or claims arising out of the aforesaid accident.

5. That the Court in this proceeding adjudge that the petitioners are not and neither of them is, liable, to any extent for any loss, damage or injury or for any claims whatsoever, in any way arising out of or in consequence of the accident above-described; or, if the petitioners, or either of them, shall be adjudged liable, then that any liability be limited to the amount or value of their, its or his interest in the steamship Proteus at the end of the voyage upon which she was engaged at the time of the accident and her pending freight; and that the moneys paid or secured to be paid as aforesaid be divided pro rata among such claimants as may duly prove their claims before the Commissioner hereinbefore referred to, saving to all parties any priorities to which they may be legally entitled; and that a decree may be entered discharging the petitioners, and each of them, from all further liability.

[fol. 43] 6. That the petitioners, and each of them, have such other and further relief as may be just.

Burlingham, Veeder, Masten & Feary, Proctors for Petitioners. Roscoe H. Hupper, General Solicitor, U. S. Railroad Administration, Coastwise Steamship Lines, of Counsel.

[fol. 44] Jurat showing the foregoing was duly sworn to by Hugh Neill omitted in printing.

[fol. 45] EXHIBIT TO PETITION

SCHEDULE A—Claims

Claimant	Amount
Lucey Manufacturing Corp., Woolworth Building, New York, N. Y.	
Cargo	$312.34
M. G. Margaria, 220 West 13th Street, New York, N. Y.	
Personal effects	153.50
Joseph Robb, 485 West Street, New York, N. Y.	
Personal effects	127.00
Joseph Robb, 485 West Street, New York, N. Y.	
Personal Injury	Not given.
Vulcan Steel Products Co., Inc., 120 Broadway, New York, N. Y.	
Cargo	$5,550.00
E. Rube, 15 East 40th Street, New York, N. Y.	
Baggage and Personal Effects	Not given.
Joe Willis, 38 Water Street, Watervliet, N. Y.	
Baggage and Personal Effects	82.00
[fol. 46] John Hymes, 308 Twelfth Street, Brooklyn, N. Y.	
Baggage and Personal Effects and Cash deposited with purser	160.00

Claimant	Amount
Jerry Hite, 1063 E. Main Street, Rochester, N. Y. Baggage and Personal Effects	235.00
Onofrio Galletta, Bay Shore, L. I. Baggage and Personal Effects	$664.60
Claflin, Inc., Worth and Church Sts., New York, N. Y. Cargo	475.80
H. T. Boyd, Captain of Proteus. Baggage and Personal Effects	998.80
Booklovers' Library, of Philadelphia. Books	18.75
Rema Armstrong, 1717 West Third Street, Wilmington, Delaware. Baggage and Personal Effects	525.00

Attorney: J. Frank Ball, 205 Equitable Building, Wilmington, Del.

[fol. 47] IN UNITED STATES DISTRICT COURT

ANSWER OF STANDARD OIL COMPANY

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Answer of Standard Oil Company (New Jersey), as Owner of the Steamship Cushing, to the petition of Southern Pacific Company, as Owner of the Steamship Proteus, and Walker D. Hines, as Director General of Railroads, in a cause of Limitation of Liability, civil and maritime, alleges as follows:

First. The respondent denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the first article of the petition.

Second. It admits the matters alleged in the second article of the petition.

Third. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the third article of the petition.

Fourth. It admits that a collision occurred between the Steamships Proteus and Cushing on the early morning of August 19, 1918; but [fol. 48] it denies that the circumstances attending the said collision are fully and correctly stated in the fourth article of the petition, and it denies the allegations contained therein, except as are hereinafter specifically admitted.

Fifth. It denies the matters contained in the fifth article of the petition.

Sixth. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the sixth article of the petition.

Seventh. It admits that actions have been started as stated in paragraphs 1 and 2 of the seventh article of the petition, but it denies that it has any knowledge or information sufficient to form a belief as to the matters contained in paragraph 3, of the said article.

Eighth. It admits the matters alleged in the eighth article of the petition, but it denies that the said petitioners are entitled to the exemptions claimed therein.

Ninth. It admits the Admiralty and Maritime Jurisdiction of the United States and of this Honorable Court, but it denies the other matters alleged in the ninth article of the petition.

Tenth. Further answering, the respondent alleges as follows:

[fol. 49] On August 17, 1918, at about 2 o'clock in the afternoon, the Steamship Cushing left the port of New York in ballast bound for Beaumont, Texas. Upon her departure from the port of New York as aforesaid, the Cushing had no cargo or passengers on board.

The Cushing, after passing out of the entrance to New York harbor, shaped her course in a southerly direction and proceeded upon her voyage without any trouble, incident or mishap, until the early morning of August 19, 1918, when she had reached approximately Latitude 34° 45′ North and Longitude 75° 49′ West, and was in a position approximately Southwest of Diamond Shoal Lightship Buoy. At that time she was steering a southwesterly course. The night was cloudy. In accordance with orders received from the United States Naval Authorities, which orders she was compelled to obey, the Cushing was not showing any navigation lights. The second officer was on the bridge in charge of the navigation. A lookout was stationed in the crow's nest, and another lookout was stationed on the forecastle-head. The officers, seamen and lookouts were all of them duly attending to their respective duties and a full watch was in attendance. Shortly before 1 o'clock on the morning of said day, a ship without lights, which afterwards proved to be the American Steamship Proteus, was reported by the lookout. The Proteus when first sighted bore on the starboard bow of the Cushing, and was seen to [fol. 50] be approaching on a course substantially parallel to that of the Cushing, and which would enable the two vessels, to pass starboard to starboard by a good margin of safety.

The Proteus, for a time, continued to hold her course as first seen and appeared to be complying with the situation which called for a starboard to starboard passage. She was then seen to alter her course sharply to starboard, apparently at full speed, and under a hard aport helm. Shortly thereafter she was heard to blow a signal of one blast, but she still failed to display any navigation lights. The Cushing immediately put her helm hard-a-port, put her engines full speed astern, sounded a signal of three blasts, and switched on her side lights. The Proteus continued to swing sharply without any apparent change of speed, until she was across the bow of the Cushing,

and the two vessels came together, the bow of the Cushing striking the Proteus about amidships.

The headway of the Proteus carried her clear, and the Cushing then stood by in communication with her while it was found that the Proteus was filling rapidly. The boats of the Proteus were lowered, and her master, officers, crew, and passengers were transferred to the Cushing. The Proteus sank about one hour after the collision. The Cushing then got under way towards Norfolk, and it was subsequently reported to her master that one coal passer of the crew of the [fol. 51] Proteus had jumped overboard from the latter vessel after the collision and had been lost. The Cushing arrived at Lynnhaven Roads on August 20, at 1:30 a. m., and anchored for the night. At 10 o'clock on the morning of the following day, August 21, a pilot arrived on board and the Cushing proceeded to Hampton Roads where she arrived about 1 o'clock in the afternoon of said day, and the survivors were landed safely.

Eleventh. The respondent further alleges that the collision aforesaid and the loss, damage, injury and destruction resulting therefrom were occasioned and incurred without the privity or knowledge of the petitioner herein, and were not caused or contributed to by any negligence or fault on its part or on the part of those in charge of the Steamship Cushing, or on the part of any persons for whom the petitioner herein was or is responsible, but were due solely to and caused wholly by the negligence of the Steamship Proteus and those in charge of her in the following respects among others:

1. She was not in charge of competent persons.

2. She was not maintaining a proper and efficient lookout.

3. She was not fully equipped and was not manned and officered with a sufficient number of competent men.

[fol. 52] 4. She failed to discover the presence of the Cushing as promptly as she should have done.

5. She did not hold her course so as to pass the Cushing starboard to starboard, although the vessels when first sighted by each other were in a situation which called for a starboard passage.

6. She negligently ported her helm in an attempt to cross the bow of the Cushing.

7. She failed to give any seasonable whistle signals as warning of her intended navigation.

8. She failed to heed the signals from the Cushing and did not seasonably stop and reverse her engines or take any steps as she might have done to avoid the collision or mitigate the resulting damages.

Twelfth. All and singular the premises are true and within the Admiralty and Maritime Jurisdiction of the United States and of this Honorable Court.

Wherefore the respondent prays that the petitioners' prayer for exemption from and limitation of their liability for the loss and damage resulting from the aforesaid collision, and the facts as set forth in the petition, be denied, and that the petitioners be held solely liable for the said loss and damage, and that a decree may be [fol. 53] entered herein, in favor of the respondent for its damages, as set forth in its claim, duly presented herein, with interest, and with costs, or that the court will grant such other or further relief as may be just in the premises.

Kirlin Woolsey & Hickox, Proctors for Respondent, Standard Oil Company (New Jersey).

[fols. 54–508] Jurat showing the foregoing was duly sworn to by —— —— omitted in printing.

[fol. 509] In United States District Court, Southern District of New York

The Cushing, The Proteus

Opinion—Filed June 26, 1920

These are two petitions for the limitation of liability arising out of a collision which took place on August nineteenth, 1918, about thirty miles southwest of the Diamond Shoal Lightship, half way between Hatteras and Cape Lookout and about twenty miles off the coast. Both ships were American owned and had been requisitioned by the United States for war purposes. The "Proteus" was steaming north fifty degrees east true from Cape Lookout at about thirteen and a half knots an hour. The "Cushing" was steaming in the opposite direction south forty-seven degrees west true at about twelve and a half knots. The moon was in the southwest and, therefore, on the bows of the "Cushing" and on the quarter of the "Proteus." The night was clear, though there were occasional clouds. Both vessels were sailing without lights in accordance with the orders of the navy.

The "Cushing" made out the "Proteus" over ten minutes before the collision rather narrow on her starboard bow, and after a few [fol. 510] minutes, finding that her bearing broadened, concluded that the ships would pass starboard to starboard. The "Proteus" did not make out the "Cushing" until between two and three minutes before the collision occurred, and then supposed her to be dead ahead, or very fine on her port bow. At once the "Proteus" put her helm hard-a-port and continued porting under full steam until the collision. Between a minute and a minute and half after putting her helm over, and about the same interval before the collision, the "Proteus" blew a single blast, but continued under full headway, and failed to show her lights, which could have been switched on. Shortly after the "Proteus" hard-a-ported and, as the court con-

cluded, after her blast, the "Cushing" ported, hard-a-ported, turned on her lights and reversed her engines, at the same time giving three blasts. She was backing when the collision occurred and her heading had changed about two points to starboard. The collision was either at right angles or six points leading forward on the "Proteus," the bows of the "Cushing" striking the "Proteus" a little abaft of amidships.

The "Cushing" stood by, took off the crew and passengers of the "Proteus," which floated for an hour and then sank, becoming a total loss.

Suits were brought against the "Cushing" by the "Proteus" and the cargo and these limitation proceedings were thereafter commenced.

Charles C. Burlingham and Chauncey I. Clark, for the "Proteus"; [fol. 511] J. Parker Kirlin and William H. McGrann, for the "Cushing";

T. Catesby Jones, for the cargo of the "Proteus."

LEARNED HAND, D. J.:

In this case the conceded facts seem to me to help dispose of much of the controversy regardless of the testimony of the witnesses, based upon necessarily fugitive recollection. It is agreed that the "Proteus," a vessel three hundred and ninety feet long, with a speed of thirteen and a half knots, was upon a course north fifty degrees east true. It is further agreed that she made no manœuvre except to hard-a-port her helm and continue at full speed. If she had turned through an angle of eight points, as is practically certain, we can tell with much approach to certainty the position of her bow off her course at the time of the collision, i. e., what had been her "Traverse." We can also tell how far she had advanced, measured along her projected course from the point of porting, i. e., her "advance." The basis of this calculation I take from Admiral Knight's "Modern Seamanship," plate 93, page 303. This shows that the "advance" of a ship three hundred and fifty feet long is four hundred and fifty-three yards, and for a ship four hundred and twenty feet, six hundred and sixty-three yards. The "advance" of the "Proteus" on the basis of the smaller ship—reckoning that the proportion is constant—would be about fifteen hundred and fourteen feet; on the basis of the larger, about eighteen hundred [fol. 512] and forty-five feet. It is, of course, impossible to be exact but it is reasonably safe to take it at seventeen hundred feet and to say that the bow of the "Proteus" when she ported was thirteen hundred feet behind the place of collision, measured on her own projected course.

I shall show you later that the stern of the "Cushing" had not yet left her course taking her story of backing and porting at its full value. If she was headed two points to starboard, and her stern was on her course, her bow had made a "traverse" of a little over a hundred and fifty feet, and as she struck the "Proteus" about

amidships, the bow of the "Proteus" was substantially crossing the projected course of the "Cushing" at the moment of collision. Since it is possible to find the "traverse" of the "Proteus" by the same means as her "advance," we can tell with very reasonable accuracy how far the courses were apart. By the same calculation as in the case of the "advance" I find the "Proteus's" "traverse" to have been between eleven and twelve hundred feet.

The distance actually covered by the "Proteus" is more difficult to estimate and is not important except as it fixes the time from her hard-over helm to the collision. Captain Colomb (transparent diagram 4), gives to a vessel under similar conditions a change of about five and a half points in eighty-five seconds, a minute and a half. The distance covered by a boat four hundred and twenty [fol. 513] feet long computed on Admiral Knight's plate 93, is about twenty-two hundred and fifty feet and for a boat three hundred and fifty feet long, fourteen hundred and ten feet. If I take the distance covered by the "Proteus" at two thousand, it will not be far wrong. At the end of this time her speed is sixty per cent of her initial speed. An average of seventy-five per cent is not far wrong, or ten knots an hour, say two minutes. This corresponds pretty well with Colomb's figure for a change of five and a half points, and is, all things considered, not very far off the estimates of all the witnesses, of between two and a half and three minutes.

I can now, I think, estimate fairly closely the position of the "Cushing" when the "Proteus" ported, taking the "Cushing's" version of porting and backing and a change of two points. Colomb's diagrams (transparent No. 4), for such a situation gives a change of a little less than two points at the end of thirty-five seconds. A change of two points would not take over forty seconds, and the "advance" is just about two lengths, i. e., eight hundred and fifty feet. The earlier part of the two minutes the "Cushing" was going to full speed, twelve and a half knots, a distance of say sixteen hundred or seventeen hundred feet. Her bow was, therefore, about twenty-five hundred feet from the place of collision when the "Proteus" ported. At that time the vessels were about four thousand feet away from each other, the "Proteus" bearing a little more than one and a half points on the "Cushing's" starboard bow. The estimate of one to one [fol. 514] and a half miles of the "Proteus's" witnesses is not so far wrong as might be expected at night, and that of three quarters of a mile made by the "Cushing's" witnesses would be close, if they had seen the original change of helm, though I do not believe they did, for reasons given later.

Knight, pp. 316-318, gives a somewhat different description of the behavior of a ship backing under a hard-a-port helm, but it is to be observed, p. 318, that the discrepancy between these authors disappears in cases where the helm is first put hard over and the vessel, therefore, begins to swing before she feels the effect of the screw. He says: "If the ship has actually begun to swing in obedience to a hard-over helm before the screw is reversed, she will in most cases continue to swing the same way in spite of the screw, although much less rapidly than if the screw were not reversed." In the case at

bar the helm was put over first to port for some seconds before the engine was reversed. A very substantial part of a minute must also be allowed in the engine room (twenty or thirty seconds, Brown). Besides Bergman had to enter the wheel-house to turn on the lights and go back to the bridge to reverse. It is safe to say that the "Cushing" was quite all of thirty seconds under a port helm before the engines were reversed. This, if anything, makes the time of her swing of two points to starboard shorter than I have found.

The supposed bearing of the "Cushing" from the "Proteus" seems to me so clearly wrong that I can only account for it through [fol. 515] the excitement of the moment. It is physically impossible that the "Cushing" should ever have been on the "Proteus's" port bow. The supposed bearing of the "Proteus" from the "Cushing" is stated by the witnesses generally to have been one and a half points at five miles, but that is equally impossible. At five miles the "Proteus" would have borne about five degrees on the "Cushing's" starboard bow if the courses had been exactly parallel or eight degrees in fact. This bearing broadened till it was a little over one and a half points when the "Proteus" ported. However, it is not likely that during the earlier part of the "Proteus's" swing her changed helm without side lights could be noticed from the "Cushing." For nearly half her "advance" her mass continued on her old course and meanwhile the "Cushing" was advancing. At about the time when she began to make in upon the "Cushing" she bore substantially more than two points on her starboard bow. It was not far from that time when the "Proteus" blew her whistle and this I think is the first moment when Bergman became aware of her manœuvre. His estimate of bearing is not so far wrong then, though the distance had become about half a mile, not three quarter. I remember that he says he could tell the change in the range of the masts and saw her swing before this, but I think this most unlikely. The angle substended by the masts at that distance and seen so nearly ahead was small. It is clear from the log that he did not act till he [fol. 516] heard the whistle and that was about the time when he could first have seen any change unless by the range of the masts. If he had in fact seen the "Proteus" start to cross his bows I can scarcely believe that he would have waited at all to act as eventually he did act. Besides, his vessel would have been in a different position had he been backing and hard-a-porting for so long. Taking all the evidence, it appears, to me the more reasonable conclusion to suppose that he did not as he supposes see so finely as to observe the masts come in range, but that he saw the "Proteus" swing in and heard her whistle and then he did what he says.

I am, of course, aware that deductions of the foregoing sort are proverbially hazardous. In this case, however, they are founded on unusually certain data, and what is perhaps more, they correspond surprisingly well with the observations of the witnesses where these are not in conflict. As to the period of the "Cushing's" backing, her testimony rests entirely upon estimates made at a moment of great excitement except that in the engine room, the entries in whose

log I am unfortunately forced to conclude from inspection, have been tampered with.

Such being the facts, as I find them, the fault of the "Proteus" is open and unquestioned. To take but one, the failure to sound her whistle until midway on her swing, cannot be shown not to have contributed to the collision. For the greater part, perhaps the whole, of the interval between her hard-a-port helm and her whistle she [fol. 517] was still on her course. I have concluded that Bergman failed to act for probably a minute after she in fact put her helm over, and had he not so waited the collision would not have happened. If he had got a single blast at once, as he should, it is of course impossible to say that he would not have acted.

Furthermore, it seems to me a clear fault not to have switched on her lights at once when she began to manoeuvre. Whatever latitude is to be allowed to commanders because of submarines, the period of caution ends when the ships begin to avoid collision. "The Larchgrove," 1 Lloyd's List Rep. 498. Had the "Proteus" done so, Bergman would have seen the red light open before he did in fact notice any change in course. These two faults I find and it is not necessary to consider the more doubtful question of the sharpness of her lookout. That the case was not one of head on meeting but of starboard to starboard appears plain. I think it indistinguishable from the case of the "Worsley Hall," mentioned below.

As to the "Cushing," the question is indeed more embarrassing. In spite of Bergman's admission that he saw the masts swing into range, I have for the reasons I have given concluded that he did not observe the "Proteus's" change of course until her mass began to move towards him, at about which time he heard her whistle. It is quite impossible in my judgment to convict him of any delay in the remaining period, or the ship either, assuming two men should [fol. 518] have been on the bridge as they should. He had not much more than a minute to do everything and he succeeded in getting his helm over and his ship backing for a period of over half that time. Of course the calculations are not to be taken exactly, but this very fact forbids holding him at fault. I am aware that it is a somewhat strong finding in the face of his admissions to say that he did not see the change earlier, but I can onlly add that it is clear that as he was certainly keeping a sharp lookout and was ready to act, it seems to me incredible that he should have waited after he became aware of the "Proteus's" perilous undertaking. If the "Cushing" was at fault it was for letting matters come to such a pass that the emergency could arise at all.

The "Cushing" had had the "Proteus" under observation for at least ten minutes, and had pretty clearly made out her course. Bergman assumed, though he clearly had no right to do so, that the "Proteus" had equally made him out. He had every advantage in seeing and it was clearly negligent not to consider his own low visibility at night to one peering away from the moon. He knew also, at least he was charged to know, that he only had a berth of about three lengths and that while all would be well if the "Proteus"

kept her course, he was dealing not with mechanical forces but human being whose automatic conduct when surprised is not absolutely predictable. In short, he had no right to suppose anything about the conduct of the "Proteus" if surprised in a narrow berth, unable to make out without lights what was the course and speed of another ship close aboard.

[fol. 519] What he had reason to expect actually happened. The "Proteus" made him out, misunderstood his position, and did exactly the wrong thing. It was then too late. Now he had had it entirely in his hands to avoid just that emergency. I quite agree with his conclusion that it was not a case of Article Eighteen at all, because the two vessels would "pass clear of each other" if both kept their courses. The English cases earlier than the "Worsley Hall," H. of L. Dec. 19, 1919, so far as they may be to the contrary, are no longer to be considered as English law. To have ported and crossed the "Proteus's" bows would have been improper and hazardous, and it was not in the least necessary. Yet it does not follow that he should have kept on without giving warning. All cases are necessarily of special circumstance in which the ships run without lights; the rules of course pre-suppose that the courses of all ships shall be declared to each other, so that they shall be able to navigate accordingly. Though Bergman knew that he could pass clear, he should have used a caution measured by the consideration that the "Proteus" might not have the same knowledge.

He was bound, I think, either to flash or set his lights, or to give her a wider berth. If he had given as his reason for not showing his lights earlier that he was afraid of submarines, I should not perhaps hold his decision wrong, that being the judgment of the master pro hac vice as to when an emergency had arisen. But he does not give that as an excuse; on the contrary, he says that he sup-

[fol. 520] posed that the "Proteus" already saw him and was navigating accordingly. That, as I have said, he had no right to assume. It does not appear that he would not have thought the situation an emergency if he had supposed that the "Proteus" did not see him. Hence it seems to me that he cannot be excused on a ground which he does not suggest and because of a choice which apparently he did not make. At best it would have been proper to call Miller, the master, and let him make the choice whether the time had come to give some signal with the lights.

But I think it is not even necessary to assume this. Indeed, if he had given as his reason that in his judgment the time had not yet come under the navy orders to flash or set his lights, I should still think his navigation improper, because the very fact that he could not give the usual information of his presence, and so set in operation as it were the steaming rules—that very fact imposed upon him the duty to insure against the possibility of danger arising from the special circumstances in which he was forced to steam. All that he need have done when the "Proteus's" course was once made out was to ease off to the south, and give her an ample berth, a manoeuvre which would in addition have involved in its execution the clear warning of a double blast. It cannot be reasonable for a

master under such circumstances to hold his course through thick and thin because from his superior position he and he alone can see that all will go well if neither ship changes her helm. No rule for- [fol. 521] bade this; he was not bound to hold his course and he had open sea on his port hand. It required but a little easing of his helm during the period of at least five minutes after he had made her out and before she saw him. The most common prudence would have suggested that he make his scanty assurance doubly sure. Why he should have so persistently held a course which brought him to such close quarters is inexplicable, except upon the assumption that he slavishly followed the letter of the master's orders or was unwilling to rouse him. I find the "Cushing" at fault because with the fullest possible notice she failed either to warn the "Proteus" of her advance or to put between them a safe distance.

It is quite true that both in her own petition and in her answer to the "Cushing's" petition the "Proteus" alleges as a fault the supposed starboarding of the "Cushing", but that is quite another matter. It refers to a starboarding after the "Proteus" ported, which never took place. The fifth and seventh charges of fault include failure to warn the "Proteus" and the eighth is a general charge of failure to take precautions when the risk of collision should have become apparent. I think that that risk did become apparent as soon as the "Cushing" saw or should have seen that the vessels would pass so close that a confusion or misunderstanding of their courses on the part of the "Proteus" might result in collision.

In the "Worsley Hall," H. of L. Dec. 19, 1919, a very closely similar situation was held not to be a head-on case, but one of passing star'oard to starboard. The ship corresponding to the "Cushing" [fol. 522] was entirely relieved upon closely analogous navigation to that of the "Cushing" here. Yet there is one difference which appears to me to be of final importance between that case and this, there the ships made each other out about one and a half miles off, and the "Worsley Hall," as soon as she got the loom of the "Ioannis Vatis" at once uncovered her lights; which the "Ioannis Vatis" did not do. 1 Lloyd's List, Rep. 414. At least this was in the case of the "Worsley Hall" and was not denied by the "Ioannis Vatis." As the joints speeds of these two ships was eighteen and a half knots this was over four minutes before they would have met. That time would have been ample in the case at bar to avoid collision, even if the "Cushing" had waited, as the "Worsley Hall" did not, for a very substantial period after she discovered the "Proteus". The case cannot be taken for more than that such a situation is a starboard to starboard meeting, with which I humbly agree, and that the navigation of the "Cushing" in extremis was free from fault in the case at bar. The other cases of ships without lights decided in England do not appear to me to be relevant. This, so far as I am advised, is the first case which has arisen in this country.

I find it impossible to reach any but a speculative conclusion based upon the "Cushing's" camouflage and in any event it appears to me to be irrelevant.

June 26, 1920.

[fol. 523] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of STANDARD OIL COMPANY (NEW JERSEY), Owner of the Steamship Cushing, for Exemption from or Limitation of Liability

INTERLOCUTORY DECREE—Filed Aug. 30, 1920

A petition having been filed on or about March 14, 1919, by the Standard Oil Company (New Jersey) as owner of the steamship "Cushing," under sections 4283 to 4285 of the Revised Statutes of the United States and the several acts amendatory thereof and supplemental thereto for the limitation of its liability for loss, destruction, damage and injury occasioned by or resulting from a [fol. 524] collision between said steamship "Cushing" and the steamship "Proteus" an or about August 19, 1918;

And said Standard Oil Company (New Jersey) having also contested any and all liability resulting from or in connection with said collision independently of the limitation of liability claimed as aforesaid, and having pursuant to the order of this court filed herein an ad interim stipulation for the value of said steamship "Cushing" and her pending freight in the sum of One million two hundred and thirty-five thousand ($1,235,000) Dollars.

And this Court having on or about March 19, 1919, issued a monition against all persons claiming damages for any loss, destruction, damage or injury occasioned by said collision requiring such persons to appear and make due proof of their respective claims before Louis Bennett, Esq., a Commissioner of this Court, on or about the 30th day of June, 1920;

And public notice of said monition having been duly given as required by law and the practice of this Court, and said Commissioner having made and filed his report on the 1st day of July, 1919, wherefrom it appears that certain claims there enumerated and no others have been presented pursuant to said monition except such additional claims as are enumerated in the order entered herein December 3, 1919, and additional claims as are enumerated in the orders of December 15, 1919, and of —— —, 1920, noting the defaults of all other persons or corporations claiming damage for any and all [fol. 525] loss, damage or injury caused by or resulting from the collision aforesaid;

And the cause having come on to be heard upon the pleadings and proofs of the respective parties, and having been argued and submitted by the respective advocates, to wit, J. Parker Kirlin, Esq., and William G. McGrann, Esq., of counsel for the petitioner Standard Oil Company (New Jersey), and Charles C. Burlingham, Esq., and Chauncey I. Clark, Esq., of counsel for Southern Pacific Company and Walker D. Hines, Director General of Railroads, and T. Catesby Jones, Esq., of counsel for the cargo interests; and the Court having rendered its decision holding both the steamship "Cushing" and the steamship "Proteus" at fault for the collision and the petitioner entitled to the benefit of limitation of liability as provided

for in sections 4283 to 4285 of the Revised Statutes of the United States.

Now, on motion of Harrington, Bigham & Englar, proctors for the cargo interests, it is,

Ordered, adjudged and decreed that the prayer of the said petitioner Standard Oil Company (New Jersey), that it be exonerated from liability because of the facts and things in the petition alleged be denied; and it is further

Ordered, adjudged and decreed that both the steamship "Proteus" and the steamship "Cushing" were at fault for the collision in the proceedings mentioned, and that the claimants who have filed claims [fol. 526] in this proceeding recover of the petitioner and its stipulators, in accordance with the terms of their respective stipulations, their damages with costs subject to the validity, amounts and priorities of said claims and to the claim of the Proteus which was also at fault for the collision being reduced to a claim for half damages and being marshalled in accordance with law and to the rights of the petitioner to a limitation of its liability as hereinafter provided; and on motion of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for Standard Oil Company (New Jersey) it is

Ordered, adjudged and decreed that said petitioner is entitled to limitation of its liability as provided by the Act of Congress approved March 3, 1851, and embodied in Sections 4283 to 4285 of the Revised Statutes of the United States and the various acts amendatory thereof and supplemental thereto; and it is further

Ordered that it be referred to Edwards H. Childs, Esq., Commissioner, to appraise the steamship "Cushing" and her pending freight as of the 19th day of August, 1918, the date on which her voyage terminated, and report thereon to this court with all convenient speed; and it is further

Ordered that the amount or value of the petitioner's interest in said steamship "Cushing" and her pending freight when finally [fol. 527] appraised and approved by the Court be paid into the Registry of this Court by the petitioner to abide the event of this proceeding, or, at the option of the petitioner, a stipulation be filed by the petitioner in such appraised amount providing for the payment thereof or such part thereof into Court when and as ordered, and it is further

Ordered that it be referred to Edwards H. Childs, Esq., Commissioner to take such further proofs as may be offered as to the amount, validity and priority of all claims to which objections have been filed, to marshall said claims in accordance with law, and to report thereon with all convenient speed to this Court, together with the evidence taken before him in respect of said claims, and with his opinion in addition as respects personal injuries, loss of personal effect or other property, and the damages sustained by the owners of the steamship "Proteus" and by the owners of the cargo; hearings before said Commissioner to be brought on by any party in interest by notice of four days.

Learned Hand, U. S. D. J.

[fol. 528] IN UNITED STATES DISTRICT COURT

TESTIMONY AS TO VALUE OF STEAMSHIP PROTEUS ON REFERENCE BEFORE EDWARDS H. CHILDS, ESQ., COMMISSIONER.

New York, December 7, 1920.

Appearances:

Kirlin, Woolsey, Campbell Hickox & Keating, Proctors for Standard Oil Company of New Jersey; W. H. McGrann, of Counsel.

Burlingham, Veeder, Masten & Fearey, Proctors for Southern Pacific Company, and other claimants, C. C. Burlingham, A. H. Neeley, of Counsel.

Harrington, Bigham & Englar, Proctors for Cargo Interests; Corning G. McKennee, of Counsel.

Henry O. Falk, Proctor for Bonita Hearn.

Cohen Brothers, Proctors for Dolores Francis; F. Whitlock Newman, of Counsel.

Frank M. Patterson, Proctor for Lucy Manufacturing Company; D. C. Mellen, of Counsel.

[fol. 529] Proofs for Claimants Southern Pacific Company

FRANK S. MARTIN, called as a witness on behalf of the Claimant, being duly sworn, testified as follows:

Direct examination by Mr. Burlingham:

Q. You are a marine surveyor and engineer, Mr. Martin?

A. I am a marine engineer, a naval architect and appraiser.

Q. And you have been engaged in your profession here, Mr. Martin, for thirty years or more?

A. Over thirty-five years.

Q. And in the course of your work as an appraiser you have kept yourself thoroughly familiar I suppose with values of vessels?

A. I have.

Q. During the war did you serve on one of the Government boards?

A. I was a member of the Ocean Advisory Board on Just Compensation. Ex-Judge Cohen was Chairman of the Board.

Q. Who appointed the board?

A. The board was appointed by the Admiralty Division of the Shipping Board.

Q. What was its object?

A. To advise the Shipping Board, give advice of cost where vessels had been requisitioned and lost, to arrive at their value.

[fol. 530] Q. And in the course of your work you had to pass on the value of hundreds of vessels?

A. A great many.

Mr. Burlingham: There is no question of his competency, is there, Mr. McGrann?

Mr. McGrann: No.

Q. Do you know the steamship Proteus of the Southern Pacific?
A. I do.
Q. How long have you known her?
A. Almost from the time she was built.
Q. When was that?
A. In 1900, in May.
Q. She was built where?
A. At the Newport News Shipbuilding Company, Newport News, Virginia.
Q. Give her dimensions for the sake of convenience?
A. She was 405 feet over all, 390 feet between perpendiculars, 48 feet beam, 32 feet 9 inches depth, 3,006 net tons, and 4,836 gross tons registered.
Q. Do you happen to know her dead weight?
A. Dead weight about 4,000 tons.
Q. She was a single screw?
A. Yes, a single screw.
Q. Steel?
A. Steel triple expansion engines, and Scotch boilers.
Q. How lately had you seen her before she was lost in the month of August, 1918?
A. A few months before.
Q. For what purpose, what occasion?
A. I made a great many surveys of Southern Pacific vessels from time to time.
[fol. 531] Q. Do you recall the occasion of your seeing her a couple of months before her loss?
A. I do not.

Mr. McGrann: He did not say a couple of months.
The Witness: I said a few months. I think it was a few months. I have seen her before when I have been surveying other vessels, and I know her sister ship, the Comus, very well.

Q. Are you able to say whether the Proteus had been kept up and what her condition was a few months prior to her loss?
A. I would say the Proteus is as well kept up as any vessel they had, and the vessels of the Southern Pacific were all kept up well. I examined the Comus last summer in regard to her condition and she was well kept up.
Q. It is the Proteus that we are interested in.
A. She was a sister ship and I am gauging one by the other.
Q. In August, 1918, what in your opinion was the value of the Proteus?
A. $1,225,000.
Q. Had you had occasion to value any other vessels about that time, Mr. Martin?
A. In August.
Q. Well, in that period, during the 1918 period?
A. I valued from 150 to 200 vessels every year.

Mr. Burlingham: I think that is all.

[fol. 532] Mr. McGrann: I object to the conclusion of the witness as to the valuation, and to the opinions expressed by the witness in that it has not been shown that a proper foundation has been laid for the figure which the witness has stated to be the value in his opinion at that time.

The Commissioner: Are you making a legal argument?

Mr. McGrann: I am putting that objection on the record, and I move to strike his testimony out.

The Commissioner: You may go ahead and cross examine, and if you want you may have an objection on the record and an exception, and you may put anything you like on the record to preserve your rights.

Mr.McGrann: Without prejudice to my motion to strike out the figure——

The Commissioner: It will be understood that you make a motion to strike out the figures of the witness, which motion is denied and you may have an exception.

Cross-examination by Mr. McGrann:

Q. About how long before August 19, 1918, was it that you saw the Proteus, Mr. Martin?

A. I cannot tell you definitely, Mr. McGrann.

Q. Do you know what the Proteus was engaged on at this date, what sort of service?

A. Trading between New York and New Orleans.

Q. Do you know whether she was on owner's account or whether [fol. 533] she was requisitioned?

A. I only know by hearsay.

Mr. Burlingham: You can state it, I don't object, and get it on the record.

Q. Did you hear she was under requisition for the Government?

A. I heard she was under requisition for the Government, being operated by the line.

Q. You don't know anything about the terms of the requisition, do you?

A. No, I do not.

Q. Do you know what the original cost of the Proteus was in 1900, when you say she was built?

A. I was told that she cost $546,018.

Q. Who told you that?

Mr. Burlingham: You need not cross examine him about it. I will let it stand if he says so.

Mr. McGrann: Do you say that that is the figure?

Mr. Burlingham: Well, it will never be contradicted.

Mr. McGrann: It may not be contradicted but I want evidence.

The Commissioner: Ask him if he concedes that figure is correct, and then ask Mr. Burlingham.

Mr. Burlingham: Yes, I think that is what she cost.

Q. She had been operating how long?

A. Eighteen years.

[fol. 534] Q. In your appraisal of vessels do you strike off anything from the cost price of depreciation and age?

A. I do.

Q. And what do you strike off?

A. It depends. During the last four years we have never taken off more than two and one half per cent during the war. I don't mean the last four years, I mean during the war, when vessel property was very valuable, the appreciation more than made up for the depreciation.

Q. Well, in ordinary course what is your rule?

A. In ordinary course, in ordinary times?

Q. Is it five per cent?

A. Five per cent, yes.

Q. What is the life of a vessel of this class ordinarily, the class of the Proteus?

A. According to the care the owners give her. This company has two vessels forty years old, the Chalmette and the Excelsior, both in commission.

Q. As a general rule, Mr. Martin, what is recognized as the life of a vessel, of a steel or an iron vessel?

A. The ordinary vessel like a freighter would be anywheres from twenty-five to thirty years, but we have coastwise vessels thirty-five and forty years old still in commission.

Q. You do not maintain, do you, Mr. Martin, that a vessel which is twenty years old was as valuable as a vessel which is new? Its intrinsic value I am speaking of now?

A. Her earning power is just as great, but her sale value would probably not be as great.

[fol. 535] Q. Isn't it true, Mr. Martin, that there was not any market value for American vessels on August 19, 1918, by reason of the fact that the Shipping Board was requisitioning these vessels and that sales were not permitted?

A. That is true.

The Commissioner: That would not have any bearing on the market value, would it?

The Witness: There was no market during the war. That is, as far as American vessels under requisition were concerned.

The Commissioner: And even vessels that are requisitioned are worth something?

The Witness: They cannot be sold, but the value was there just the same.

Mr. McGrann: I will rest here and renew my motion to strike out the valuation of $1,200,000.

The Commissioner: I thought you conceded this man was an expert?

Mr. Burlingham: Don't you concede he is an expert?

Mr. McGrann: I did not concede that he is an expert on market values if that is the basis of your claim. You have not stated the basis of your claim.

Mr. Burlingham: I asked what it was worth.

[fol. 536] Mr. McGrann: You have stated this vessel had a certain cost price. This witness has testified that there was depreciation and that there is no market value of this boat. If you are proceeding on the theory that this is a valuation which represents a market value as of that time, then I must object of course both to this witness stating any such valuation and to the figure itself as representing the market value.

Mr. Burlingham: If you really desire you can ask him how he got at that figure. I was waiting for you to do it but if you don't want to do it I will do it. I thought you would say I was cross examining my witness.

Mr. McGrann: You have the burden of proof it seems to me.

The Commissioner: The question is whether he has made a prima facie case.

Mr. McGrann: I renew my motion and rest on that.

The Commissioner: I will deny your motion and consider of course anything you may have to offer in the future as to the legal sufficiency of the evidence, and if I find I am wrong I will overrule myself.

Mr. Burlingham: Do you want to go on now?

The Commissioner: Do you want to cross examine him some more?

Mr. McGrann: No.

Mr. Burlingham: Then I will ask him.

[fol. 537] By Mr. Burlingham:

Q. Mr. Martin, how did you get at this value of $1,225,000? What does it represent?

A. There being no sales to guide me, I took the estimated cost of the reproducing a vessel of the same size and description as the Proteus in August, 1918; and the estimated cost was $1,750,000. From that cost I deducted two and one half per cent for eighteen years' depreciation, which is $525,000, leaving a value of $1,225,000.

Q. Why did you take two and one half per cent when you have stated to Mr. McGrann on cross examination that five per cent is the normal?

A. That is under normal conditions, but during the war, from the beginning of the war in 1914 up to a short time after the armistice and even up to within a year vessel property was more valuable than it has ever been before, and if you took that five per cent you would have the value far lower than the real value of the vessel.

Q. What do you mean by the real value of a vessel?

A. I mean the value of the vessel, that she could be sold for, and also what would be her value estimated on earning capacity.

Q. You mean if sold subject to requisition?

A. No.

Q. What do you mean?

A. If she could be sold in the market, if she could be sold.

The Commissioner: If the market was open and free?

[fol. 538] The Witness: Yes, if the market was open and free.

Q. When was the market closed?

A. When we went into the war in April, 1917.

Q. When did it open again?

A. Shortly after the vessels were released from requisition, after the armistice.

Q. And were values of vessels appraised during that time, vessels that had been lost and were paid for by the Government, at prices at which they were appraised?

A. A great many of them were.

Q. Were those recommendations made by your board to the Government and to owners for that purpose?

A. Yes.

Q. And were they acted on by the Government?

A. They were.

Q. And have you borne that in mind at all in your conclusion?

A. I have.

The Commissioner: Before you give full effect to war conditions, when you took the cost of the vessel at $1,750,000 at that time, it was the war that was responsible for the fact that it would have cost so much more, isn't it?

Mr. Burlingham: To reproduce?

The Commissioner: To reproduce.

The Witness: Yes.

The Commissioner: The depreciation would be a thing that would happen regardless of war, wouldn't it? If it is fair to take off five [fol. 539] per cent when there is no war, is it not fair to take off five per cent when there is a war? Because it is the physical depreciation when you take the five per cent, is it not?

The Witness: It is the physical depreciation.

The Commissioner: And then you are starting with the war prices in the supposed cost of the vessel, the supposed cost of reproduction, and why shouldn't you take off five per cent?

The Witness: I will illustrate: You take a vessel that costs to reproduce $200 a dead weight ton, and assume it was a 10,000 ton vessel, and that vessel was we will say twenty years old.

The Commissioner: In the two and one half per cent you took the actual life of this particular vessel, and she had been depreciating prior to the time of war conditions, had she not?

The Witness: I am trying to illustrate. Take a vessel that cost $200 a dead weight ton, and say twenty years old at five per cent would have a depreciation value of $750,000, which would only be $75 a ton. And we all know that is a ridiculous value during the war. The vessel would sell for a great deal more than that. Then you have to take into consideration the upkeep of a vessel. Some companies keep up a vessel a great deal better than others.

[fol. 540] Q. Mr. Martin, how long after the armistice did the high values continue and the high cost of construction?

A. Up to about the first of this year. Since freight rates have fallen values have fallen.

Q. And looking over the whole period tell us where the peak was?

A. The peak of the values was just about shortly—just about the time of the ending of the war.

Q. And am I to understand that after the armistice and for a year and a half after boats were sold for these high prices?

A. They were, and up to the beginning of this year.

Q. And the cost of construction kept very high you say?

A. It did.

Q. But there were actual sales of course after the armistice, were there not?

A. A great many I know for instance where vessels twenty years old, take an oil tanker for instance, sold for $170 a ton.

Q. And how much did it cost twenty years before?

A. That vessel cost about the time she was built—about $70 a ton.

Q. How many tons was she would you say?

A. About 7,000 tons.

Q. Did she cost——

Mr. McGrann (interrupting): Dead weight?

Q. She cost about $490,000 and she sold for what?

A. For $170 a ton.

Q. Per dead weight ton, you say?

A. Yes, a dead weight ton.

[fol. 541] Q. Would the appreciation in value completely wipe out the depreciation?

A. I have claimed that all along. I claim that ever since the war the appreciation wiped out the depreciation.

Q. Is your valuation based on theory or is it based on experience in actual sales after the armistice?

A. It is based on sales—based mostly on sales since the armistice, and also before the war, even before we went into the war vessels were selling for $300 a ton.

Q. You mean between 1914 and 1917?

A. Yes.

Q. And then when the Government stepped in with its requisitions all sales of American vessels ceased?

A. Yes.

Q. Over a certain tonnage?

A. Yes.

Q. And after the armistice the embargo so to speak was lifted?

A. Yes.

Q. And then they began to be sold again?

A. Yes, that is correct.

Q. At these very high prices?

A. Yes, that is correct.

Q. And it is on the consideration of those facts that you have fixed this sum of $1,225,000 as your best judgment of what the boat

was worth and could have been sold for if it could have been sold on August 19, 1918, is that it?

A. That is absolutely correct.

Mr. Burlingham: That is as far as I can go with that.

The Commissioner: Taking these sales that you know about and that you have taken into consideration, with the amounts for which [fol. 542] the sales were made, about what would it have cost to build a new vessel at that time less two and one half per cent per year for depreciation?

The Witness: It is even less than two and one half per cent. For instance, you take the vessel I spoke of, that vessel could have been built at the time she was sold for about $175 a ton, and yet she sold for $170.

The Commissioner: And really you are being conservative?

The Witness: Yes, very conservative.

The Commissioner: When you place the cost at the high price, less two and one half per cent you are giving a figure that you consider conservative under all the facts and circumstances?

The Witness: Yes, that is the way I feel about it.

By Mr. McGrann:

Q. What is this vessel that you mentioned as selling for $170 a dead weight ton?

A. The steamship Gargoyle. I was a party to the purchase of the Gargoyle for the American Sugar Refining Company, a lake built vessel converted into an oil tank.

Q. Are oil tankers in a class by themselves?

A. Yes, they are higher priced than others. I simply use that as an illustration.

Q. There was a great demand for such boats *as* the time the Gargoyle was sold?

A. Yes.

[fol. 543] Q. For oil tankers?

A. Yes.

Q. And is it true that that was a special sale, the Gargoyle? There was special considerations in connection with the purchase of that vessel at that time?

A. I don't know o. any special considerations. It might be that they wanted the vessel.

Q. Because of the peculiar demand at that time for an oil tanker by the purchaser of the Gargoyle?

A. You are speaking of a sale—I know what you mean.

Q. Are you speaking of a sale in which I took part?

A. I suppose there was some consideration.

Q. Are you speaking of a sale in which I took part?

A. Yes.

Q. The Gargoyle?

A. Yes. Then I will mention the Toledo, another one that sold for $160 a ton, a lake boat.

The Commissioner: Was the Toledo a tanker?

The Witness: Yes, the Toledo was a tanker. Assume that tankers are worth 10 to 15 per cent more than freight boats, even then that shows a great advancement in values. The Toledo was a lake boat originally converted into a tanker.

The Commissioner: The Proteus was a freight boat?

The Witness: The Proteus was a freight and passenger boat.

[fol. 544] Q. Do you know whether or not there has been any settlement as between the Government and the owners of the Proteus of the loss of the Proteus?

A. No, sir, I do not.

Mr. Burlingham: I will answer for the record, there has been none.

Q. You said you were adjusting values?

A. Not of that one, I did not.

Q. The Proteus was in the Railroad Administration, was she not?

A. Yes, the Proteus was.

Mr. McGrann: I may say on the record here that the Director General of Railroads is a party to the proceedings of limitation of the Proteus.

The Commissioner: And a party to this proceeding now pending here?

Mr. McGrann: A party to the limitation of the liability of the Proteus.

Mr. Burlingham: Yes, the libel was filed, Mr. Commissioner, by the Railroad Administration and the Southern Pacific Company, against the Cushing. They both join in the libel.

The Commissioner: Were they served with notice of this hearing?

Mr. Burlingham: I represent them.

Q. Mr. Martin, can you tell us what the present values are.

[fol. 545] Mr. Burlingham: I object to that as having nothing to do with it.

Mr. McGrann: I hold it has as much to do with it as the pre-war value.

Mr. Burlingham: I withdraw my objection.

The Witness: Of ordinary vessels you mean?

Q. Yes.

A. The values are dropping. Newer vessels have been sold by the Shipping Board and are running from $185 a dead weight ton down to as low as $148 a dead weight ton.

Q. Isn't it true that there have been sales at less than $100 a dead weight ton for vessels since the war?

A. There may be some very old ones, old lakers. There were a number of lake vessels brought down from the lakes during the war by the Government and repaired and put in condition that have never been a success, and they were sold at very low figures, but they are not the value of ocean going vessels.

Mr. McGrann: I have no further questions.

Mr. Burlingham: Has anyone else any further questions?

The Commissioner: Does any other claimant present here want to examine Mr. Martin?

Mr. Burlingham: Do you wish to ask anything more, Mr. Commissioner?

The Commissioner: No, I do not.

(Witness excused.)

[fol. 546] ALFRED G. SMITH, called as a witness on behalf of the claimant, being duly sworn, testified as follows:

Direct examination by Mr. Burlingham:

Q. Mr. Smith, you are the Manager of the New York & Cuba Mail Steamship Company?

A. Yes, sir.

Q. And have been for how many years?

A. I have been connected with the company for over thirty years.

Q. That is known popularly as the Ward Line, is it not?

A. Yes, sir.

Q. And have they a fleet of vessels that ply between the United States and Cuba and Mexico?

A. And other ports besides, yes, sir.

Q. And other ports?

A. Yes.

Q. And your fleet of vessels consist of how many boats?

A. At present we own 17 ships, but we are operating 110 ships.

Q. You have been a steamshipman the better part of your life, haven't you?

A. Practically all my life since I left school.

Q. Here in New York?

A. Yes, here in New York.

Q. And you know, I suppose, and keep yourself advised as to values of vessels and sales of vessels, do you not?

A. Principally on costs of construction.

Q. Many of your ships have been built under your direction, have they not?

A. Under my personal direction, yes, sir.

[fol. 547] Q. And during the war I suppose your vessels were requisitioned by the Government?

A. Every one of them.

Q. Did you lose any of them during the war?

A. If you mean lost by disaster or something of that sort or as an act of God, no, but we lost ships in other ways.

Mr. McGrann: Physically destroyed, you mean.

Q. No boats were sold of course after we entered the war, were they? No American vessels of considerable tonnage?

A. I don't recall any, Mr. Burlingham. Vessels were taken, however, by the Government.

Q. And paid for by the Government?

A. And paid for by the Government, yes.

Q. The requisition was in some instances as I remember merely a form of charter, either as a time charter or bareboatform of charter and in other cases the Government took by requisition and paid for American vessels, did it not?

A. In our case the Government took vessels from us on requisition and turned them over to us for operation. In other cases they took vessels and as far as our company was concerned, they disappeared from the face of the globe and we did not know what had become of them. They operated them themselves.

Q. You say you are familiar with construction costs?

A. Yes.

[fol. 548] Q. How far was that effected by the war,—the cost of construction?

A. Very materially increased, Mr. Burlingham.

Q. When did the rise begin?

A. Immediately on the declaration of war.

Q. Do you refer to the declaration of war in 1914?

A. The big war, the world war.

Q. And what was the condition in this country, what were the conditions in this country we will say in 1918?

A. As to the cost of construction, there was a very material increase of material and a very material increase in the wage.

Q. Would you be able to say, Mr. Smith, from your knowledge what the cost of construction would be of a boat per dead weight ton in 1918? Of course that question relates principally I suppose to a freight boat. You calculate dead weight so much per ton, do you not?

A. On freight boats we always calculate in dead weight capacity or dead weight carrying capacity, but we do not do that with passenger boats, and I would like to make a distinction here.

Q. I wish you would, because you have a large number of freight and passenger boats, have you not?

A. Yes, sir, and I may add too, that the cost depends largely on the type of the boat you are building. We are accustomed to speak in terms of tonnage without regard to the type, the speed, the class of the service for which the boat is intended, and it makes a very material difference in arriving at values.

Q. Are you familiar with the Southern Pacific boats?

A. I am familiar with their boats, yes.

[fol. 549] Q. You knew the Proteus in a general way?

A. I had seen the boats under construction, some of their boats under construction and I have visited the boats.

Q. And you know what type of boat she was?

A. In a general way, yes.

Q. She was engaged in trade between New York and New Orleans?

A. Yes, that is her trade, in connection with their railroad.

Q. And she was built for freight and passengers?

A. Yes.

Q. Do you recall how many passengers she carried?

A. About 200.

Q. And there was nothing unusual about her type as a coaster? Wasn't she a passenger boat?

A. No, but an exceptionally well constructed boat as coasters go.

Q. How do they compare with the Clyde and Mallory Lines?

A. I considered their boats were more—that she was a stronger built boat than the ordinary so-called Florida coast type of boat.

Q. And she was very much I suppose like your own boats?

A. Not quite as large, no. I would say the boats are approximately about two-thirds of the size. I am speaking now of the Proteus.

Q. Have you any boats similar to her, 4,836 gross and 3,006 net tons?

A. The nearest we have is the Esparanza and the Monterey.

Q. Are they a similar type boat to the Proteus?

A. Only as respects the size and general conditions.

[fol. 550] Q. And how many passengers are they equipped to carry?

A. Approximately 200.

Q. And those boats were built for you?

A. They were built for us.

Q. Where?

A. At Philadelphia, at Cramps.

Q. This boat, the Proteus, was built at Newport News Shipbuilding Company, you know that?

A. Yes.

Q. Have you had any boats built there?

A. We are having some built now.

Q. But most of your boats have been built where?

A. All our American built vessels have been constructed either at the yards of John Roch & Sons or the William Cramps yards.

Q. Now I come back to my first question about the cost of construction of a vessel of this type in the month of August, 1918. What would you say it was?

A. The cost of constructing this vessel in 1918?

Q. Yes, to reproduce her?

A. May I be permitted to say how I arrived at it?

Q. Surely.

A. As I made it out?

Q. Yes.

A. In arriving at a fair market value for the Proteus I proceeded on two separate different lines. In the early part of 1917 we had the steamship Havana and her sister ship Saratoga taken over by the Government. The Navy Department took the vessels and at that time the question of what compensation we would receive for the vessels came up. A board had been appointed by the Navy Department consisting of naval officers, naval constructors and [fol. 551] engineers, as well as some commercial men,—one promi-

nent ship owner, and the President of the American Bureau of Shipping qualified as an engineer and builder.

Q. That was Stevenson Taylor?

A. Yes, Stevenson Taylor, and those gentlemen after listening to my testimony, etc., appraised the vessel and paid us $2,240,000 for each one of those vessels, one built in 1906 and the other built a few months after.

Q. What tonnage?

A. 6,400.

Q. Gross?

A. Registered gross tonnage, approximately 500 tons dead weight, passenger carrying capacity about 300.

Q. Would that be divided into tons, any kind of tons, the value at so much per ton, Mr. Smith?

A. In dealing with passenger boats we always give the gross registered tonnage. As I said before in dealing with freight vessels we always are accustomed to deal with what the vessels will carry in weight.

Q. That value would be over $350 a ton?

A. Yes, I think it figures about $350.

Q. Gross ton?

A. Yes.

Q. Have you had other experience that would lead you toward ascertaining the value of the Proteus?

A. At that time, seeking to get at a price for the ships that were taken right out of our service, we asked the builders what they would duplicate the Havana and the Saratoga for.

Q. Those were the Cramps?

A. The Cramps. They had the plans and specifications, they knew [fol. 552] what the vessels had cost to build and they were the logical people to give us a fair estimate, and their estimate was a little over $3,000,000 for each vessel.

Q. That would be $500 a gross ton practically?

A. I think exactly, in getting at this value, and as I said before I proceeded along two different lines. I said if the Havana had originally cost us $900,000——

Q. (Interrupting.) That is what it cost you in 1906?

A. Yes,—in 1906, and it was worth according to the Board of Appraisal, after considerable testimony had been given $2,240,000, then the Proteus which I calculated had cost in the vicinity of $600,000 originally, must be worth $1,500,000 less an allowance for the difference in the ages.

Q. It was six years older?

A. Yes, six years older, and I made an allowance of $150,000 and I arrived at a figure of $1,350,000 as the fair market value of that ship.

Q. Did you approach the problem from any other angle?

A. I approached it from another angle, and that was by taking the value of the Proteus to be say two-thirds of the value of the Havana, considering the vessel's tonnage, passenger capacity, speed, equipment and all that as being two-thirds of the Havana——

The Commissioner: You think it was in fact about two-thirds?

The Witness: To the best of my recollection; these are all approximate figures of course, Mr. Commissioner, I said if it will cost [fol. 553] $3,000,000 to build the Havana it will cost $2,000,000 to build the Proteus, then allowing a depreciation for her age of six hundred and odd thousand dollars brought it very close to the figures that I had obtained by the first process of $1,350,000 and it is on that that I gave the fair value of the ship as $1,350,000.

Q. That is your best judgment as to the value of the Proteus in August 1918?

A. It is, Mr. Burlingham, based on the little that I know concering—based on what I know concerning the values and prices quoted to us, awards made on ships of a similar class, that was my best judgment. Of course, you must take into consideration that these ships are built for a special trade, even the sizes of the hatches and ports, and the arrangements of the vessels were such that you cannot duplicate them. You cannot buy those things in the market. You speak of ships at $200 a ton, or $148 a ton, but in trade such as the Ward Line has with Cuba and Mexico and trades such as the Southern Pacific has between New York and New Orleans, the ships must be built to a special specification and plan to meet their wharf conditions, to make their time, make their railroad connections, carry the class of passengers they are accustomed to carry, and all those things which have a very important bearing on the value of these ships because they cannot be bought in the market. They have [fol. 554] got to be built and you have got to wait until they are finished.

Q. You cannot go to a department store and buy a ship equipped like that?

A. That is it exactly. That applies to our passenger boats.

The Commissioner: You know just exactly how much it would have cost in August, 1918, to reproduce the Proteus, and at that figure how much would you take off for depreciation?

The Witness: That is a very difficult subject, one that has been discussed of late a great deal by ship owners, what is the fair depreciation. I can say to you very frankly there are ships I would charge 10 per cent off for depreciation on, and there are others that two per cent is quite ample. It depends on the care that the owner takes of his vessel. There are many owners that go on the theory that an ounce of prevention is better than a pound of cure, and they keep their vessels in such a state of efficiency that when the periodical survey comes there is practically nothing to do to them. There are others who run them for all they are worth to get all that they can out of the ships, and when the periodical survey comes spend a quarter or a half of what the vessel originally cost to practically restore her. The policy of the Southern Pacific has [fol. 555] been similar to ours. They are very jealous with their fleet. They have ample means and they keep their vessels way up to the top notch. That is their reputation.

Q. Is that their reputation or do you know that from observation?

A. From observation, yes. I cannot answer of course as to every single reverse bar, and that every tank top is in condition.

The Commissioner: Assuming they do keep their boats in good repa-r and do not go on the theory that they would wait until something busts before they fix it, then how much would you take off?

The Witness: I would then use the same figure I have used for years, sir, and that is three per cent; roughly speaking, three per cent

The Commissioner: Mr. Martin said two and one half per cent.

The Witness: Yes,

The Commissioner: Would you make any difference because the war was on?

The Witness: Yes, we have never taken off any less than that it being simply a question of time, speaking for our line. But I would certaintly take that into consideration because you cannot get ships at any time. I mean vessels of this type.

[fol. 556] By the Commissioner:

Q. Haven't you covered that when you have taken the cost at the high prices of August, 1918? You say these ships are ships you have to have built for you, and you cannot go out into the market and buy them, and that you would have to have the ships built for you at that particular price. Then why should the depreciation be affected by the war at all? You are doubling up, aren't you? You are adding twice? If you have to have the ship built and you take the cost?

Mr. McGrann: I think what is sauce for the goose is also sauce for the gander. If you are considering the war conditions in estimating depreciation I would like to know why because I cannot understand it. If you bought a boat you would take off three per cent you say?

The Witness: In one case a man gets a brand new boat, and in another case he gets a ship that has been in operation a number of years.

The Commissioner: But I thought the depreciation would be covered by the cost.

Mr. McGrann: If the value appreciates it seems to me that the depreciation necessarily must follow and be increased in accordance with the value which he placed on the vessel at the time of war. I cannot see that it would make any difference.

[fol. 557] The Commissioner: We are running between two and one half and five per cent.

By Mr. Burlingham:

Q. Mr. Smith, isn't it so in old times that many owners regarded five per cent as a proper depreciation for a boat?

A. Five per cent has been the normal depreciation, but in the old times, to be perfectly truthful in my reply, we never considered depreciation. We never did. It is a bookkeeping requirement.

The Commissioner: Necessarily it is somewhat arbitrary of course.

The Witness: But it is brought very forcibly to the front now on account of taxation.

Q. Can you by taking an arbitrary percentage for depreciation arrive at a value which will conform approximately to the market or salable value of the vessels?

A. I think I did so in this case, in the second case that I have cited, or the second process; and if the vessel cost $2,000,000 to replace today and I deducted $650,000,—I am speaking in round figures,— because the age of the vessel that was lost.

The Commissioner: How much per cent a year would that be?

The Witness: I figured about three per cent, sir.

Mr. Burlingham: That is all.

[fol. 558] Cross examination by Mr. McGrann:

Q. First, Mr Smith, when did you see the Proteus last?

A. I haven't seen the Proteus.

Q. Have you never seen the Proteus?

A. I have never seen the Proteus. I have seen her sister ship, the Comus.

Mr. McGrann: Mr Burlingham, do you know when the Proteus was requisitioned, the date?

Mr. Burlingham: No, but I am going to find it for you. I think they all came at the same time. I think it was on December 31st, 1917.

The Witness: By the Railroad Administration.

Mr. McGrann: Wasn't she requisitioned before that?

Mr. Burlingham: I don't think so. I remember that date, because they took all the Old Dominion boats at the same time.

Mr. McGrann: And then it ultimately passed to the Railroad Administration.

Mr. Burlingham: Very likely. I will find it for you, Mr. McGrann.

Mr McGrann: I think it is material for this reason, that the witnesses here have both spoken of the upkeep of this vessel which was practiced by the Southern Pacific Company.

[fol. 559] Mr. Burlingham: I will bring down Mr. Hebble to testify as to that, and he will tell you all about it.

The Witness: It was under their control at that time.

Mr. Burlingham: I don't think they took her in the same way.

The Witness: The vessels were taken by the Government for matters of compensation at a figure, but they were operated by the same people in the same service.

Q. To return to this Board of Appraisal, Mr. Smith, I understand that you have predicated at least one system of your valuation largely on what the Board of Appraisal sitting here in New York I suppose at the time——

A. Yes, sir.

Q. Placed on certain vessels which they took from your line?
A. Yes, sir.
Q. When was the date of your appraisal, can you tell me?
A. The latter part of 1917.
Q. You could not give it any more exactly?
A. In the fall of 1917.
Q. In the fall?
A. The fall of 1917, yes.
Q. That is, that would be a year prior to the loss of the Proteus?
A. The Proteus was lost when?
Q. Assuming that the Proteus was lost August 19, 1918, it would be approximately a year?
A. Yes, probably ten months or so approximately.
Q. Are you familiar with the theory on which the Board of Ap-
[fol. 560] praisal made their appraisals, that is, do you know that they considered what is known as the just compensation?
A. I don't know by what process they arrived at that figure. I do know that the award was very unsatisfactory to our directors and the question arose as to whether we would stand it or not. We were advised by counsel as to what would be the result of our refusal to accept, that we would take 75 per cent and have to sue for the balance left.
Q. Let me ask you this: Do you know or not that the Board of Appraisal considered not only the value of the vessel, its intrinsic worth, but in addition to that considered what would be proper to pay to the owners for the loss of the use of that vessel?
A. I repeat, sir. I don't know what factors they used or what matters they considered in arriving at the appraisal and I have never been able to find out.

Mr. Burlingham: I don't think ordinary citizens ought to penetrate the minds of our Navy Department.
The Commissioner: No, but if they considered the loss of the use over a certain period, that would be some criterion.
Mr. McGrann: I cannot offer any testimony on that. I want to know what this witness knows of the method of the Board of Appraisal.
The Witness: I was kept waiting for several days after presenting my figures and my claim. I was waiting about two weeks before they rendered their decision.

[fol. 561] Q. You of course testified similarly to Mr. Martin who I believe stated to Mr. Burlingham that there was not any market value of American vessels during August, 1918?

Mr. Burlingham: There was not any market. He did not say any market value.
The Commissioner: That is a question of law.
Mr. McGrann: I say, market based on a sale, which is a market value.
The Witness: No, I think not, not at that time.

The Commissioner: There is a statutory value for the purpose of this proceeding.

Mr. McGrann: I am speaking now when I say market value—I mean a value placed on sales of the vessels at that time, which was ordinarily I think what is known as market value at law; that is the sale price.

The Commissioner: What the market value was under the circumstances.

Mr. McGrann: And that is established by what actual sales were made at the time.

Mr. Burlingham: No, it says "value."

The Witness: Not after we entered the war. Immediately before we entered the war the demand for American ships was so great that we were offered all sorts of prices for our ships. That was before we entered the war.

[fol. 562] Q. That is just the point, that during this time there was an inflated value for vessels?

A. Not of that type.

Q. Not of what type do you mean?

A. The type of the steamer Proteus, a passenger steamer for a special service. I think a distinction ought to be made, a very strong distinction made between types of ships. That is my great point.

The Commissioner: You do not claim that as a matter of law the fact that the season was closed for selling has any effect?

Mr. McGrann: Why, I certainly do; if Mr. Burlingham is proceeding on the theory of market value, if Mr. Burlingham is proceeding on the theory that he can establish a value here and it is based on market value, why it seems to me he has got to show market value.

The Commissioner: Isn't that a quibble?

Mr. McGrann: Not at all.

The Commissioner: You both concede the fact you cannot sell the vessel. That does not show that the vessel has no value. War conditions and the fact that the Government interferred and asserted itself made it impossible to sell, but the thing had value. What are the elements of the value? What is the use of quibbling about market value or inflated value?

Mr. McGrann: Will you allow me to state my views?

[fol. 563] The Commissioner: Yes.

Mr. Burlingham: Do you want to argue it now?

Mr. McGrann: No. This is all in line with the testimony of this witness and Mr. Martin. My point, however, is this, that if these owners had gone out into the market or had gone to shipbuilders at that time and paid moneys for boats under the conditions that existed then, necessarily that would be a very clear claim. But here we have owners coming in, having paid a certain amount for a vessel, that vessel having been lost and never having been specifically replaced, there is no evidence here,—I do not see

how they claim or make claim for what I contend is an inflated value due to war conditions as an appraisal of their loss. We have to place them in the same position as they would be if they had not lost this vessel. They have lost so much money. I don't know what it is. That is for you to say.

Mr. Burlingham: Any further questions of Mr. Smith.

Q. Do I understand you to say that after you got these estimates from Cramps that you actually placed an order with them to build a vessel?

A. No, sir.

Q. Wouldn't the special construction of these vessels of the Proteus [fol. 564] type which you have described and emphasized reduce their value as a merchantable ship?

A. Generally speaking yes, for world trade, yes.

Mr. Burlingham: That is all, Mr. Smith.

(Witness excused.)

New York, January 6, 1921.

Amos S. Hebble, a witness called on behalf of the Claimant Southern Pacific Company, being duly sworn, testified as follows:

Direct examination by Mr. Burlingham:

Q. Mr. Hebble, you are the Superintending Engineer of the Southern Pacific Company, are you not?

A. Yes, sir.

Q. And have been how long?

A. Since 1907.

Q. How long have you been connected with that Company?

A. Since 1897.

Q. In what capacity before you became Superintending Engineer?

A. As assistant and Chief Engineer on various ships, and as Assistant Superintending Engineer.

[fol. 565] Q. How long have you been ashore?

A. Since 1904.

Q. What are your duties as Superintending Engineer?

A. I have charge of design, construction and maintenance of all the floating equipment of the Atlantic Steamship Lines.

Q. What do you mean by the Atlantic Steamship Lines?

A. That is, the Southern Pacific Atlantic Steamship Lines.

Q. How many ships have they in their fleets?

A. We have twenty-seven ships at the present time in commission.

Q. And have they been constructed at different American yards?

A. Yes, sir.

Q. Principally at what yards?

A. The William Cramp & Sons Ship & Engine Building Company of Philadelphia; the Newport News Shipping & Dry Dock

Company; the Fall River Shipbuilding Company, and the Downey Shipbuilding Company.

Q. You of course know the "Proteus"?

A. Yes, sir.

Q. She was built in 1900, I think?

A. Yes, sir.

Q. Do you remember her building?

A. Yes.

Q. At the Newport News Dry Dock Company?

A. Yes, sir.

Q. Are your vessels classed in any registry?

A. No, sir.

Q. None of them?

A. No, none of them.

Q. Is that the policy of the company?

A. Yes, sir.

Q. And always has been?

A. Since about 1905 or 1906.

Q. — sunk?

A. Yes, sir.

[fol. 566] Q. What is the reason for that, can you state it?

A. The Southern Pacific Atlantic Steamship Lines have always maintained a very high standard of construction and a very high standard of maintenance, and for that reason there has never been any question about classification for insurance or other purposes.

Q. Just for the purpose of the record how much did the "Proteus" cost?

A. She cost five hundred and fifty-seven thousand six hundred and some dollars.

Q. Did she have any structual changes or very heavy repairs?

A. She had thirteen staterooms added.

Q. When was that?

A. That was about 1912; 1910 or 1912, somewhere thereabouts.

Q. Anything else serious?

A. She has been fitted with a refrigerating apparatus and large refrigerating boxes, and she was reboilered in 1909, and at that time all of the vessel structure in the way of the boilers and in the way of the fire room was renewed.

Q. Who took care of the repairs of this boat, the company, or did you have it done in outside yards?

A. It was done by the Newport News Shipbuilding Company.

Q. Who made the changes?

A. The reboilering was done by the Newport News Shipbuilding Company.

Q. At what cost, roughly?

A. About $90,000.

Q. But the upkeep year by year, who took care of that?

A. That is taken care of generally by the Southern Pacific Company's own shops.

[fol. 567] Q. Where are their own shops?

A. At Piers 49 and 50 North River.

Q. And where was she docked?

A. She was docked at Tietjen & Lang's, Hoboken, and the Robins Dry Dock Company.

Q. Who supervised those repairs?

A. I did.

Q. And upkeep?

A. I did.

Q. What do you say as to the character of the upkeep of their boats, or of this boat?

A. The "Proteus" was maintained to a very high standard as is the general practice of the Southern Pacific Company.

Q. Can you speak of it comparatively, in comparison with others?

A. The standard of maintenance of the "Proteus" is very much higher than most other companies operating out of this port and as good as any.

Q. When was this boat requisitioned?

A. She was taken over by the Railroad Administration on the 31st of December, 1917.

Q. Had she been requisitioned before by the War board, or any other branch of the Government?

A. No, sir.

Q. How was she operated after the Railroad Administration took her?

A. She was operated in the regular service of the Southern Pacific Atlantic Steamship Lines, in the service she had originally been operatng in.

Q. Between New York and New Orleans?

A. Yes, between New York and New Orleans.

Q. She did not go into any Atlantic voyages, or anything of that sort?

A. No, sir.

Q. And she was in that service when she was——

[fol. 538] Q. How about her upkeep during that period from the 31st of December, 1917, to the day of her loss on the 19th of August, 1918?

A. She was maintained by the company's shops in the same manner as she was when she was under the control of the Southern Pacific Company.

Q. I haven't got it on the record, but let me know, if you can, what was her speed?

A. Fifteen knots.

Q. What do you consider the life of an American steamship to be, of this type?

A. The life of an America steamship of the type of the "Proteus", well constructed and well maintained, should be forty years in first class service, and the vessel would still have some life in second class or ordinary service.

Q. What do you base that opinion on, Mr. Hebble?

A. I base it on the fact that we have several passenger ships in

operation at the present time that are in a high state of maintenance and are over forty years of age.

Mr. Burlingham: That is all.

Cross-examination by Mr. McGrann:

Q. Did you have anything to do with writing off depreciation of the vessels of the Southern Pacific Company?

A. No, sir.

Q. Have you any knowledge of the practice of the Southern Pacific Company in writing off depreciation?

A. No, sir.

[fol. 569] Q. Haven't you any heresay knowledge?

A. I have some heresay knowledge, no actual knowledge.

Q. Who would have that knowledge in your company?

A. The manager.

Mr. Burlingham: I think it is entirely irrelevant. It is a mere matter of bookkeeping, what their habit is of writing off. It is a mere matter of corporate bookkeeping.

The Commissioner: What it is based on might be material, what the habit is based on. I do not believe it amounts to very much by itself.

Q. Who do you say would have that knowledge?

A. The Manager.

Q. What is his name?

A. Mr. Jungen.

Q. When was the last time prior to August 19, 1918, that you made any repairs or any renewals on the "Proteus"?

A. The trip before that date that she was in New York. It is our practice to make repairs and renewals from time to time on all our ships from trip to trip as they required. We always make some repairs on them at every trip to the port of New York.

Q. Can you state what was done on that occasion?

A. Not from memory but I can from my records.

Q. Isn't it true, Mr. Hebble, that the "Proteus" was operated somewhat more strenuously after the Railroad Administration took charge than she had been previously?

A. No, sir.

[fol. 570] Q. You don't think it made any difference whatever in the operation of the vessel?

A. No, sir, she was on a regular schedule.

Q. Isn't it true that all vessels were operated more strenuously and suffered more hardships during the period of the war?

A. I would not say that.

Mr. Burlingham: You are thinking of the Navy.

The Witness: Some of them, yes.

Q. Think of our great Merchant Marine. What is your answer?

A. I would not say all steamers; some of them, yes, but the

"Proteus" was operated on account of being a passenger ship on a regular schedule and that schedule is practically the same during the period of Federal control as it was under Southern Pacific control.

Q. You had several of your vessels requisitioned, had you not?

A. Yes.

Q. Among them, the "El Dia,"—I mean requisitioned prior to the Railroad Administration regime?

A. Yes, sir.

Q. There were thre other vessels of the same type in your company?

A. Yes.

Q. They were taken out of the service of the Atlantic Transport Lines, were they not?

A. Yes.

Mr. Burlingham: You mean the Atlantic Steamship Lines?

Q. The Atlantic Steamship Lines?

A. Yes.

[fol. 571] Q. Didn't that put upon other vessels of your company a greater burden to carry out the general work in which your whole fleet had been engaged?

A. On the freight vessels, but not on the passenger vessels.

Q. Isn't the "Proteus" a freight vessel?

A. She is a freight and passenger vessel combined.

Q. Did your shops to which you have referred have anything to do with upkeeping the vessels which had been requisitioned after December 31, 1917?

A. No, sir.

Q. How does the "El Dia" compare with the "Proteus" in tonnage?

A. She is about 650 tons less tonnage than the "Proteus."

Q. The "El Dia" is?

A. Yes.

Q. How about the other three vessels? I believe you said there were four?

A. They were practically the same tonnage as the "El Dia." They were sister ships.

Q. Were they passenger ships?

A. No, sir, they were exclusively freight vessels.

Q. Exclusively freight vessels?

A. Yes, sir.

Q. Was the "Proteus" so constructed and in such condition during August, 1918, that she could have entered into the transatlantic voyages?

A. Yes, sir.

Q. Had she ever made a transatlantic voyage?

A. No, sir.

Q. You base your statement or opinion on what? What is your reason for saying that she was fit to make a transatlantic voyage if she had never made one?

A. She was constructed—she was designed and constructed in a [fol. 572] manner to fit her for ocean service. She was certificated by the United States Steamboat Inspection Service to operate on the oceans. She was, except for her passenger accommodations, identically the same type and construction as the "El Dia." The "El Dia" was requisitioned by the government and made several transatlantic voyages.

Q. Would it have been necessary to have altered the "Proteus" considerably structurally in order to fit her for transatlantic service?

A. No, sir.

Q. You are quite sure of that?

A. I am positive.

Q. Do you know anything about the custom of any other company than yours as to writing off depreciation on vessels?

Mr. Burlingham: We object to that as irrelevant.

A. No, sir.

Q. Was any change ever made in the main engines of the "Proteus" from the time of her construction in 1900?

A. No, nothing to speak of. I think she had a new high pressure cylinder installed.

Q. That was a repair, wasn't it?

A. Yes, or replacement. There were no changes.

Q. What do you say as to the type of the "Proteus" in 1918, as compared to vessels built about that time, or a little prior for the same character of service?

[fol. 573] Mr. Burlingham: When, in 1918?

Mr. McGrann: Yes.

Q. That is, what would be the difference in type, if any?

A. There would have been some difference in type. We have all learned of improvements about ship design in that period from 1900 to 1918. There would have been some changes in type.

The Master: Some improvements?

The Witness: Yes.

Q. Would that apply to engines and boilers as well as to hull construction?

A. No, not particularly to engines and boilers or hull construction, but in design the type would have changed a little. The engines and boilers of the "Proteus" were very modern and the hull construction of the vessel was strong and rigid, and such changes as might have been made in the vessel in 1918 over 1900 would have been more in a matter of design, and of course some minor improvements in the propelling machinery.

The Commissioner: If you built a sister ship to the "Proteus" you would get a better boat?

The Witness: Yes, you would get a better designed boat.

Q. How about the speed? You have given the speed and I assume [fol. 574] that is the maximum speed, fifteen knots, of the "Proteus."

Would a passenger and freight vessel constructed in 1918 have around the same speed or greater speed or less speed?

A. The same speed for that trade.

Q. For that trade?

A. Yes, for the trade in which the "Proteus" was engaged.

Q. You admit, however, that speed had also increased during that twenty years in general construction?

A. But not for the particular trade in which that vessel was engaged. She had a certain time to leave New York and a certain time to arrive in New Orleans, and if we were building a ship to-day for that trade she would have fifteen knots.

Q. If this is true, Mr. Hebble, isn't it also true that this vessel was designed for a special service and not for a general service?

A. Yes, sir.

Q. And that her value therefore would be influenced by that fact if you had to sell that vessel in an open market?

A. No, I would not say that. That vessel was of a type that she could be operated any place that business offered, although she was designed to meet a particular trade; she was suitable for transatlantic or South American or West Indian trade.

Q. But she had never been used for any of those trades?

A. No, sir.

The Commissioner: Suppose she was the only boat engaged in this [fol. 575] trade and had a monopoly of it, and the boat was built for the purpose of the trade and could not be used for any other purpose and there was not any market and they were the only buyers, and they could not sell the boat to anybody else, what bearing would that have on the question of value?

Mr. Burlingham: It would be worth nothing according to Mr. McGrann's theory.

Mr. McGrann: Her value must be affected by her special design.

Q. Do you happen to know—for the purposes of the record—when the Railroad Administration surrendered control of the vessels of your fleet?

A. On the first of March, 1920.

Q. Do you know whether or not the Railroad Administration, as a government agency has made any settlement with your company for the loss of the "Proteus"?

A. Not to my knowledge.

Q. Who would know that?

A. I am sure I would know it if such a thing had been done.

Q. Why haven't they made a settlement, do you know?

A. I don't know.

Q. Are they awaiting the outcome of this suit?

A. I don't know.

Q. Have you got the plans of the "Proteus"?

A. Part of them; yes, sir.

Mr. McGrann: I call for the production of all the plans of the "Proteus" that are in the possession of the company.

[fol. 576] Mr. Burlingham: We will produce them.

Q. Have you any summaries of the logs of the "Proteus" during the period from December 31, 1917, on?
A. We have some abstract logs.
Q. That is what I referred to.

Mr. McGrann: I shall ask for the production of the abstract, and also for abstracts say for a period of two years prior to December 31, 1917.

Redirect examination by Mr. Burlingham:

Q. You are able to tell what the cost of construction of a vessel similar in all respects to the "Proteus" was in August, 1918?

Mr. McGrann: I object to that unless some foundation is laid for this witness' knowledge.
Mr. Burlingham: He has first to answer yes or no.

Q. Are you able to state?
A. Yes, sir.
Q. On what is your ability based, or what does it rest on?
A. On the general increase in ship construction costs.
Q. No, I refer to your knowledge; how do you get that knowledge?

The Commissioner: The result of your experience in what? What [fol. 577] experience have you had that leads you to have knowledge of the cost?
The Witness: My knowledge would be based on what other vessels have cost.

Q. Do you keep yourself advised of the cost of construction in American shipyards of vessels of all sorts and devices?
A. In general, I do; yes.
Q. And you were so familiar in 1918, were you not?
A. Yes, sir.
Q. State what the cost per ton would be, or was in August, 1918, for constructing a freight and passenger vessel of the type of the "Proteus"?

Mr. McGrann: I make the same objection; it is very clear that this witness from what he has testified has no personal knowledge, unless he can show that he has something more than he has testified to, and his opinion would be simply at best hearsay.
The Commissioner: Do you want to cross examine him on that?
Mr. McGrann: I press my objection to his qualification. I think the burden is on Mr. Burlingham to show me he is qualified.
The Commissioner: Yes.
Mr. Burlingham: I maintain I have qualified him thoroughly as an expert.
The Commissioner: I think it is too general.

[fol. 578] Q. How many years have you been following the cost of construction of vessels in America yards?
A. For the last fifteen years.

Q. How many vessels have been constructed for you during that time?
A. Eleven.
Q. And were they constructed after bids on specifications?
A. Yes, sir.
Q. Did you have to do with the preparation of the specifications?
A. Yes, sir.

The Commissioner: Do you know what the bids were personally?
The Witness: Yes, sir; I designed the ships and furnished the specifications.

Q. And during the course of your work as superintending engineer for this line for so many vessels, is it or not your habit to advise yourself as to the cost of boats for other lines?
A. I keep myself posted on the cost of boats for other lines at all times.

Mr. Burlingham: I maintain he is thoroughly qualified.
The Commissioner: I will overrule the objection and Mr. McGrann can note an exception.
Mr. McGrann: I state on the record that of course this witness may testify as to the cost of the eleven vessels which he has said were constructed for his company, and of which he has personal knowledge, but that does not qualify him to answer the question which counsel has propounded to him.

[fol. 579] By the Commissioner:

Q. Do you know what ships were costing in the summer of 1918, the ships that were being built then?
A. Yes.
Q. To your knowledge?
A. Yes.
Q. Did you keep in touch with the cost at that time?
A. Yes, sir.
Q. And have you knowledge of what ships did cost at that time?
A. Yes, sir.

Mr. McGrann: I should like to cross examine him now.
The Court: Yes, you may do so.

By Mr. McGrann:

Q. Did your company construct any vessels in 1918?
A. No, sir.
Q. Or request bids for construction?
A. No, sir.
Q. Is it not your duty as superintending Engineer of Southern Pacific Company——

The Commissioner: He designed the boat.

Q. —to take part in the construction of any other vessels? That is not your duty, is it?

A. Except that of acting as special expert to the United States Shipping Board for the period of just about that time, and I knew their costs and what they were doing. They were published from time to time in the shipbuilding magazines.

[fol. 580] Q. Your knowledge, then, was obtained by publications and from something that was told to you by other people, was it not?

A. Yes, sir; largely.

Mr. McGrann: I move that it be stricken out. I maintain it is not enough and he is not qualified.

The Commissioner: That is denied.

By Mr. Burlingham:

Q. Answer the question as to the cost of construction during that time?

Mr. McGrann: That is not the best evidence.

The Commissioner: That objection goes to the weight.

Mr. McGrann: I maintain Mr. Hebble does not know.

Mr. Burlingham: That is not the question being asked now. It is a definite question to which objection should be stated.

The Commissioner: I have ruled. I think the question goes to the weight.

The Witness: What is the question?

By Mr. Burlingham:

Q. What was the cost of construction of vessels of the type of the "Proteus" in August, 1918, the summer of 1918?

A. For the whole ship or on the basis of gross tonnage or [fol. 581] what?

Q. On the basis of gross tonnage. That is the standard, is it not, for a freight and passenger vessel?

A. That is usually the standard for freight and passenger vessels—the gross tonnage

Q. Whereas, for freight vessels it is on dead weight capacity, is it not?

A. Exactly; about $380 a gross ton.

Q. Was that the peak?

A. No, I should say the peak came a little before that time.

Q. And when did it fall?

A. The peak of the prices fell—the prices began to fall in the latter part of 1918.

Q. And by the summer of 1919, what had they got to?

A. They had got down—for vessels of that type, you mean?

Q. Yes.

A. I should say there had been a reduction of perhaps $20 a gross ton.

Mr. Burlingham: That is all.

By the Commissioner:

Q. What would the total cost be at that rate?
A. About a million and three-quarters dollars.

Mr. Burlingham: $1,750,000?
The Witness: Yes.

Q. And then you would have had a boat better than the "Proteus" was at the time she was built due to the fact that during the eighteen [fol. 582] years the art had developed and you would have got something better?
A. No, that was for reproduction of the "Proteus."
Q. Without any improvement in design?
A. Without any improvement in design.

By Mr. Burlingham:

Q. What did you mean when you spoke to Mr. McGrann of the improvements in design? Explain that phrase as distinguished from the hull and engines?
A. Since the "Proteus" was constructed the lines or models of ships have been changed and their runways and entrances have been altered; the ratio of length to beam has been changed some, and a great many other features of design that have entered into ships during that time that have really made for better ships and have made them faster and to carry a little more with the same horsepower, etc.

By Mr. McGrann:

Q. And that has increased the radius also, has it not? I mean her fuel capacity, her steaming radius?
A. Not necessarily unless you make the bunkers larger.
Q. Hasn't all the improvements conduced to that? For instance, has there not been improvements in materials which have allowed vessels to be constructed lighter?
A. No, sir. The materials in 1900 were of practically the same tensile as they are today.
[fol. 583] Q. Without prejudice to my objection which I still maintain, I ask you to state more specifically how you arrive at $380 per ton, per gross ton as the constructive cost during the summer of 1918, of a vessel of the exact type of the "Proteus"?
A. Will you give me just a moment to figure?
Q. Yes.
A. The cost of construction of ships of that type had increased between 1900 and 1918, just about three times.
Q. Is that your answer, Mr. Hebble?
A. Yes, sir.

Mr. McGrann: I move it be stricken out as not responsive, and I ask the question be repeated.
The Commissioner: I think I will let the answer stand. You can ask the question over again. He said something that bears on the general subject, but he has not answered the specific question.

(The question was repeated by the reporter.)

The Commissioner: How do you know the price had increased three times? Is that what you want to know?

Mr. McGrann: No, my question is on the record.

The Commissioner: I thought that was what it meant.

Mr. McGrann: I want the specific question answered.

[fol. 584] The Commissioner: On what knowledge is the conclusion that $380 is the cost per gross ton based?

The Witness: The cost of vessels between 1900 and 1918 had increased according to statistics about three times, which would give the vessel a cost—a reproduction cost at that time of $1,750,000. By dividing the gross tonnage of the vessel into $1,750,000 we get $380 per gross ton.

By Mr. McGrann:

Q. Do you know of any construction at that time of a vessel of the type of the "Proteus"?

A. No, sir.

Q. Do you say, Mr. Hebble, that vessels which were built for the government by the Shipping Board were built at a less or at a greater cost than could have been built at the same time by private parties in our American shipyards?

A. Under the prevailing conditions I don't think there would have been any difference.

Q. Do you disagree with Mr. Hurley, the Chairman of the Shipping Board, when he states in an official report, dated June 4, 1919, to the Chairman of the Committee on Appropriation that the average net cost of ships constructed during the war period by the Government for the Shipping Board was $180 a dead weight ton?

Mr. Burlingham: I object to the form of the question. It is not [fol. 585] proper to ask the witness whether he differs from some other gentleman.

Mr. McGrann: I am cross examining him.

The Commissioner: I will let him answer. It may not be good in form, but in substance it is not objectionable.

Mr. McGrann: I am prepared to offer the report, of course.

Mr. Burlingham: The proper way to present the question I should say would be that he might direct his attention to the fact that Mr. Hurley had views about these things that were so and so, and ask if his views would thereby be changed in any respect.

The Commissioner: I will let it stand.

Mr. McGrann: I will let the question stand.

Mr. Burlingham: I withdraw my objection.

(The question was repeated by the reporter.)

A. I do.

The Commissioner: You mean by that that the figure of $180 a dead weight ton is not correct?

The Witness: Is not correct.

Q. You challenge the statement, do you?
A. I do; yes, sir.
Q. What would be your figure then?

[fol. 586] Mr. Burlingham: A dead weight ton?
Mr. McGrann: Yes, as an average, a fair average of construction.
The Witness: You simply want my best judgment on this?

Q. You have challenged the statement of Mr. Hurley. I want to know what your figure is. You must know a figure if you challenge this statement?
A. I don't pretend to know the exact figure, but I am morally sure that it is more than $180 a gross ton.
Q. How much more?

The Commissioner: He is not talking about gross tons.
The Witness: A dead weight ton.

Q. How much more?
A. I think from $30 to $40 more.

HARRY H. RAYMOND, called as a witness on behalf of the claimant, being duly sorn, testified as follows:

Direct examination by Mr. Burlingham:

Q. Mr. Raymond, you are President of the Clyde and the Mallory Lines?
A. Yes, sir.
Q. And a director of a good many other steamship companies?
A. Yes, sir.
[fol. 587] Q. And President of the American Steamship Association?
A. Yes, sir.
Q. Which embraces all the steamship companies practically of the United States on the Pacific as well as the Atlantic Oceans, is that right?
A. All ocean-going lines.
Q. You have been in the steamship business for around thirty years, have you not?
A. Yes, sir.
Q. How many ocean-going ships have you in the Clyde and Mallory Lines?
A. At the present time 36 or 37.
Q. And the Atlantic Gulf & West India Company which is the holding company and which you are an officer or director of—which?
A. A director.
Q. Controls how many more ships than that?

A. More than double that many. There have been some sold and lost—somewhere around 80.

Q. You have had a good many ships built for you in your time, haven't you? A. Yes, sir.

Q. Ranging in tonnage up to what?

A. In dead weight tonnage as high as 8,000.

Q. Freight and passenger steamships, too?

A. Yes, sir.

Q. In valuing ships for commercial purposes what tonnage do you take as the standard, gross register or dead weight?

A. Passenger boats gross and cargo boats dead weight.

Q. And the combined boats which?

A. Gross.

Q. Are you familiar with the prices of American vessels coastwise and ocean during the last ten years to twenty years?

A. Yes, sir.

[fol. 588] Q. Have you bought and sold vessels during that period?

A. Yes, sir.

Q. To a considerable extent?

A. Yes, sir.

Q. And you have had them constructed, haven't you?

A. Yes, sir.

Q. Were your vessels requisitioned, many of them, during the war?

A. On October 15, 1917, they were all requisitioned in excess of 2,500 ton dead weight. That only left three or four of the fleet that were not under requisition.

Q. And your vessels were not used in the railroad service? They were in the service of the army and the navy and the Shipping Board, were they not?

A. Until April 13, when the President by a proclamation—although the ships were under requisition at the time—he took them over for the Railroad Administration.

Q. April 30th, 1918?

A. 1918, yes.

Q. The ships which had been in regular railroad service like those of the Southern Pacific were taken I think the 31st of December, 1917?

A. As of January 1st, as I recall it.

Mr. McGrann: 1919?

The Witness: 1918.

Q. Were any of your ships lost during the war?

A. In the companies of which I am the president and general manager we lost either four or five, but only two of them directly from war perils.

Q. Two of them were torpedoed, were they?

A. Two of them were torpedoed.

[fol. 589] Q. What were they?

A. They happened to be both Mallory ships; one was the Neches and the other the San Saba.

Q. Was she formerly the Colorado?
A. Yes.
Q. Of the Mallory Line?
A. Yes.
Q. The Mallory Line—just for the record—runs from where?
A. New York to Galveston is its principal line; another one from New York to Tampa and Mobile; you might really say a service between New York and the Gulf of Mexico ports.
Q. And the Clyde Line runs from New York to Charleston?
A. Runs from North Atlantic ports to South Atlantic ports.
Q. In the service to Galveston have you had vessels substantially similar to those of the Southern Pacific which runs to New Orleans?
A. Yes.
Q. Are you familiar with the type of boat of which the Proteus was a representative?
A. Yes, sir.
Q. And do you know the Comus, too? I think that was a sister ship?
A. The Comus was a sister ship.
Q. I would like to give you the exact tonnage of the Proteus. She was 4,836 tons gross and 3,006 net register; 405 feet over all; 390 feet between perpendiculars; 48 feet beam; 32 feet 9 inches in depth; dead weight capacity 3,800 tons. I see in the record at page 3 Mr. Martin stated she was 4,000.

Mr. McGrann: He says "about."

[fol. 590] Q. She is a single screw, steel, triple expansion engines, Scotch boilers, 15 knots, with 4,000 horse-power. Have you any vessels more or less of that type?
A. I do not say that we have, Mr. Burlingham, exactly of her type. Without disparaging our own line or the ships in our own service, the Proteus in all fairness to the Southern Pacific Line is a superior ship to any we were operating to Galveston with the possible exception of the larger and newer boat that we put in, the Henry R. Mallory engaged in ocean trade now and runs to Italy from Atlantic ports, South Atlantic ports, and while of larger passenger accommodations has less freight capacity. So we have not exactly you might say a duplicate of this ship. We have them above and below and around but not just like her.
Q. Would you be able to give us from your knowledge of values and your acquaintance with the steamship business the cost of construction of a boat like the Proteus in 1918?

Mr. McGrann: I will interpose the same objection to that unless it is shown that the witness has had personal knowledge of the construction of a vessel of that type during the time stated.

A. I might answer that in this way. The New York & Porto Rico Steamship Company of which I am also a director lost the steamer Carolina, which was torpedoed, which would come nearer perhaps to the Proteus than any one in the Mallory fleet, and we asked the New-

[fol. 591] port News Shipbuilding Company who built the ship for the cost of replacing her as she was, and while those figures are available either from the yard or from the Porto Rico Company, I think it was something like two and a quarter million, and those figures are also in the Government service because that is all a matter of record before Judge Cohen's Committee.

Q. What committee is that?

A. It was a committee appointed by some branch of the Government to take the testimony of the owners of the ships that were lost during the war from war perils.

Q. And to fix the valuation?

A. Yes, to fix the valuation.

Q. And on those valuations so based the Government paid for the boats it was responsible for?

A. Yes.

Q. And that committee was rather a large committee as I recall of which Judge William N. Cohen was Chairman, and Frank Martin was on it?

A. Yes, and Stevenson Taylor, and two or three naval people.

Q. The head of the American Bureau of Shipping, is he not?

A. Two or three naval officers, I have forgotten their names, and others.

The Commissioner: How much was that per ton on the Carolina?

The Witness: I think it was somewhere around four dollars a ton.

Q. You don't mean four dollars?

A. I mean four hundred dollars.

[fol. 592] Q. What is your best judgment as to the value of the Proteus in August, 1918, and how do you get at it?

A. I made inquiry if they had asked for her replacement value, and I was given the replacement value at one million, seven hundred and fifty thousand dollars, and I made my valuation from that.

Q. And what did you work out?

A. I worked out something over one million two hundred thousand dollars, I have forgotten the exact figures.

Q. How?

A. Of allowing for depreciation of her as we usually do, and then giving them credit for a little better than the ordinary depreciation because they keep their ships up better than others.

Q. What is the rule of depreciation if there is any?

A. There is not any.

Q. Among steamship men?

A. There is not any rule. Personally I would be glad if there was one fixed. Everybody does it differently.

Q. What is the purpose of it, anyway? Is it for bookkeeping or for taxation purposes?

A. To help in taxes. I think a wise ship owner or wise owner wants to see his property written off within a reasonable period. He doesn't know what he is going to get up against. If he gets up against dull periods he cannot always carry high overhead.

Q. You are now going to tell us how you got at it?

A. I gave you the value in my judgment as $1,222,637, to which the owners as is the custom with all companies that I know anything [fol. 593] about are entitled to add superintendence, designing fees, et cetera, which I estimated on this vessel at $75,000, and that would make her value at the time of sinking $1,297,637.

Mr. Raymond, did the amounts you recovered from the Government or that were paid by the Government for these boats you have spoken of like the San Saba, play any part in your judgment in arriving at this value?

A. I cannot say it did not, but I think what had more effect on me in arriving at the value at the time of sinking was the actual cost of replacement of vessels at that time, to which we as owners felt we were entitled to and I felt the other companies were entitled to the same.

Q. And were boats sold in the market in August, 1918, or were offers made for boats?

A. I think the ships that were being sold in 1918 were more Shipping Board ships in excess of $200 a ton or around $200 a ton. There may have been some private change, or change of hands of some private companies but I don't recall them.

Q. But the requisitioning was like a blanket over the whole shipping world at the time, wasn't it?

A. Yes.

Q. And it was not until after the armistic- that you could peek under the cover?

A. You could not do anything until after the armistice because the ships were all under Government control one way or the other.

Q. How did the market hold after the lid was taken off and it was possible to buy and sell vessels directly?

[fol. 594] A. It held too strong as can be witnessed by the failures around New York today, but nevertheless it was up.

Q. How long did it last—that high market?

A. Until now. It is not as high now as it was. It started at $200. I do not think you can get a vessel today under $160.

Q. That is per dead weight ton?

A. Yes, per dead weight ton.

Q. $200 a dead weight ton?

A. Yes, a cargo vessel.

Q. And was there an active demand for vessels after the armistice and up until say 1920?

A. Only from new companies, Mr. Burlingham.

Q. Were there sales?

A. There were sales.

Q. Of steamships of considerable size?

A. Of steamships of large size.

Q. What do you say is the life of a steamer of the type of the Proteus from your experience?

A. It absolutely depends upon how they are maintained.

Q. Assume that they are kept up very well as has been testified in your hearing by Mr. Hebble today; assume that as a fact what would be the life of such a ship?

A. It is an indefinite life. We have ships which are fifty-four years old and still on the first boilers—not ships, but a ship. I should say I agree with Mr. Hebble that a ship kept up and maintained as the Proteus has been or was—and to my personal knowledge I know that—that as to her life, she would be a good ship at forty years of age, being re-boilered and cared for as they take care of them.

Mr. Burlingham: That is all.

[fol. 595] Cross-examination by Mr. McGrann:

Q. That age of course is exceptional, is it, as you have stated it, Mr. Raymond?

A. Yes, it is exceptional, but I could take the Mallory fleet in service today and give them credit for the new ones, the average age of the fleet is thirty-two years.

Q. Isn't it customary to use twenty years as the average?

A. I don't think so. Ships are not scrapped at twenty years but taken from one service to another.

Q. Well, would you say that the average age of all ships of iron and steel hulls of course that I speak of would be somewhere between twenty and thirty years?

Mr. Burlingham: Steel ships?

Mr. McGrann: Yes.

A. I hardly feel qualified to give an answer that is really fair, but I know every time you get your catalogues or circulars from foreign countries you find a lot of ships that look pretty good to you on paper that are being built between the seventies and eighties, or a great many of them between the eighties and nineties. I know of no company except the policy of the old Hamburg-American Packet Company that used to try to dispose of their ships to other people after they were ten years of age, or in fact before they required installation of their second boilers. The other lines—you take the American [fol. 596] Lines, there is not anybody around here that has ships that are not over twenty years of age or twenty-five to thirty years of age. The Merchants & Miners fleet I guess are over forty years, aren't they, Mr. Hebble?

Mr. Hebble: Pretty close to that—and the Savannah Line.

Q. Isn't it true at least, Mr. Raymond, that after twenty years the commercial value of a ship—and I say this for sale purposes—is substantially nil?

A. I wouldn't say it was substantially nil. I should say for sale purposes it would affect them.

Q. And very materially would affect them after twenty years of service, is that correct?

A. It depends upon whether she is going into line business or whether she is going to regular recognized first class companies that can operate her. We can insure ships at thirty or thirty-five years of age at probably a less rate than an outsider or a tramp man can insure one five years of age.

Q. I would like to go a little more into this question of depreciation which I think has quite a bearing on this case. I would like to have you state, Mr. Raymond, what was the average depreciation recognized prior to 1917, prior to our entry into the war by our own companies,—I mean American companies?

Mr. Burlingham: If any.

Q. If any. Undoubtedly there was some?

A. That has been a very long question; I mean it has been a ques-[fol. 597] tion for a very long period, and as near as I could find out what the average was with all the lines in the United States and those of Great Britain, it would be from three and one-half to four and one-half per cent. Very few of them are in excess of four and one-half per cent.

Q. You won't concede that they ordinarily used five per cent?

A. I don't know of but one line that used five per cent. At the time I was investigating it because we were doing it to find out for ourselves.

Q. May I ask for that one line?

A. I think that was the Ocean Steamship Company.

Mr. Burlingham: The Savannah.

Q. Do you happen to know what the Standard Oil Company of New Jersey did in that regard?

A. No. I was making my inquiry more for ships that were engaged in the regular line business or trade.

Mr. Burlingham: That is coastwise you mean?

The Witness: Coastwise and foreign.

Q. Did you state what figure you used? I don't think you did. Of course it can be worked out but for simplification let us know what you used for depreciation?

A. I used five per cent and then give them credit for being fifty per cent better than the other fellow.

[fol. 598] Q. Then it substantially amounted to two and one-half per cent?

A. It substantially amounted to two and one-half per cent. I figured over a period. There is a table and you get that table or Mr. Burlingham can get it for you, that shows this over a period of years, and you figure the depreciation at five per cent for eighteen years on a depreciated value and it equals about 39.73 per cent.

The Commissioner: What did you mean by the life of a vessel? Do you mean at the end of a period it is worth nothing?

The Witness: When you scrap or junk her, but you always sell her for a barge or something like that.

Mr. McGrann: I take it that the life of a vessel means the season of her operative usefulness for the period for which she was designed.

The Commissioner: Suppose you have a vessel the life of which is forty years and you use it twenty years and lose it, you are entitled

to twenty years more; you are entitled to the use of such a vessel for twent years more?

Mr. McGrann: Yes.

The Commissioner: If you get a new Proteus,—assume she was lost at the end of half her life or at the end of twenty years and assume she would have lasted forty years if she had not been destroyed, and you get a new one?

[fol. 599] Mr. McGrann: Yes.

The Commissioner: Then must you take off half of that?

Mr. McGrann: You gain ten years for the life of the vessel.

The Commissioner: You have lost the thing you could have used for twenty years, and Mr. Burlingham seeks in the first instance to replace it by one that will last forty years and you object to that because you say he is only entitled to half of that use. Is that your theory?

Mr. McGrann: I would follow up what you just said by saying of course the replacement would result in a ten years' at least—perhaps more—use of the vessel.

The Commissioner: Would that be a help to us in determining what amount of depreciation to take off?

Mr. McGrann: No. I say further that there is another element which is quite important and that is this: I think Mr. Hebble will concede this—that the upkeep of the vessel after twenty years of life is very much more considerable than the upkeep of a vessel after it is first constructed and put in commission.

The Commissioner: The marking off of depreciation is necessarily artificial. You know it depreciates but you don't know how much. You have to work out a scheme for practical purposes.

Mr. McGrann: I will ask Mr. Raymond this,—and I don't know of anybody more competent to pass upon it.

[fol. 600] By Mr. McGrann:

Q. What are the elements that form this depreciation that has been customarily used?

A. Speaking for myself, I followed my father and grandfather in the business and they did it and I did it.

Q. There certainly must be some foundation for such an old and honored custom?

A. And I found it everywhere I went; when I went into the Mallory Company as a youngster I found that they were depreciating the same way my folks were, and when I became a ship owner myself I did the same thing.

The Commissioner: The reasoning is historical then.

Q. To go back to the elements, isn't it of course first a depreciation physically of the thing itself?

A. No doubt of that, and you will find some owners who will if they re-boiler a ship or put extensive and extraordinary repairs on it at the end of ten years,—they will charge that to this depreciation account and it makes a hole in it.

Q. Therefore there should be some allowance?

A. Therefore the ship has got to live beyond twenty years to get your money back.

Q. Isn't another element of that depreciation what is known I believe as obsolescence? By that of course means that a vessel that had been built in 1900, just as Mr. Hebble has testified, may not be of the same good design as one built in 1918 due to improvements [fol. 601] in design and in construction and in materials?

A. I should say it could all charge up to obsolescence if you let it go for a period of twenty-five years or thirty years.

Q. Obsolescence I take it is an element that would mean simply that part of the depreciation which results from a continuous improvement in design of ships?

A. I should not say so. Mr. Hebble has testified here as to the hulls. They are a little different today than they were ten or fifteen years ago in their design, as he explained, in entering the water and leaving it in order to get greater speed with less consumption of fuel. That is what they have been working on. I am not an engineer, but these fellows have made less improvements in their motive power in twenty years than anything else in the world. That I know,—the engineers.

The Commissioner: You mean the engineers?

The Witness: Yes, the engineers.

Q. May I mention another element which I would like to have you enlighten us on, Mr. Raymond, and that is that depreciation also would include an account of the profits on the investment in the vessel itself, would it not?

A. I should not say so, Mr. McGrann.

Q. Then my understanding would be incorrect that companies on their books put down the initial cost of the vessel and write off that [fol. 602] initial cost after a period of years say from twenty to whatever it might be,—is that so?

A. That is my understanding.

Q. So that a company if it used a five per cent depreciation and placed the initial cost which would be the investment in the vessel as a starting point, would have written off entirely that cost in twenty years?

A. If they charge off five per cent on the original value each year, but so many of them don't do it. They write off on the depreciated value.

Q. That is the point I wanted to bring up. In other words some will take the initial investment and write off five per cent each year, and of course that would amount to the full amount at the end of twenty years?

A. With the exception of such amounts as have been charged against it perhaps for new boilers or engines or something else during that period.

Q. So that the method of taking the five per cent off what might be said to be the depreciated value would make it cover a greater number of years?

A. A long time.

Q. And a long time to write off finally the investment?

A. Yes.

Q. You recall that you prepared a comparative table of British and American ships for the Commerce Committee?

A. Yes.

Mr. Burlingham: You mean of the Senate?

Mr. McGrann: Yes, the Senate Committee of Commerce.

[fol. 603] Q. And in that table I notice in reading over the result that you have used depreciation in both cases of five per cent. Is that inconsistent with what you have just said about three and one-half to four and one-half per cent, and if so explain it, please?

A. That was compiled I think in recent years, or last year, wasn't it?

Q. I don't know what period it covered, Mr. Raymond. The hearing was on February 9th, 1920.

Mr. Burlingham: And on the question of selling the Shipping Board boats.

The Witness: And I think everybody has got up to five per cent now, Mr. McGrann, or more,—five to ten. I am speaking of the old days when these ships came out.

Q. You made the statement here that the high profits of the war period have probably enabled most British ship owners to mark their existing tonnage down to a merely nominal value. Would that same condition be true of American vessels or partly true of American vessels?

A. Unfortunately we are not a Merchant Marine nation like the British. They are mostly cargo vessels and they are wise and prudent. They are not surrounded or governed by a lot of laws, shipping boards and other things that we are, and when they make, as we may say, a killing or a good profit they go to work and mark [fol. 604] their ships down as any good business man would mark his stock down, but that don't affect the average depreciation here covering the period of a great many years. You will find when they are not making money and they have those lean years they won't mark their ships down then.

Q. Your view also was—and if I am wrong, correct me and explain how it has any bearing on this particular question,—that ships that are on the books of the ship owners to-day are under $100 a ton materially, and I take it that materially meant they are substantially under $100 a ton.

Mr. Burlingham: On the books?

Mr. McGrann: Yes.

The Witness: We are speaking, or we are testifying here to-day as to the value, the replacement value of a ship lost in 1918. That

same ship that the Newport News Company wants or did want $1,750,000 to replace, Mr. Hebble has already testified was built for about $550,000. Ships that had been built when yards were building at a reasonable cost and with reasonable profit, they would certainly be on the books under $100 a ton; in fact, a British ship you could buy for $30 a ton just before the war.

Q. Doesn't that represent, Mr. Raymond, to the owner of a vessel what he himself values his property at?

[fol. 605] A. No, I think the owner values his property at what it is worth at the time it is sold. That is the way we did with what we collected and with what ships we sold.

Q. What would be the cost of reproduction at that time? Did you yourself have any replacements during August or thereabouts of 1918? I mean new construction in those years?

A. There was not anybody building then; as all ships on the stocks were owned by the Shipping Board. We had two or three ships in that fix.

By Mr. Burlingham:

Q. What were the names of those ships?

A. Two of them were at Newport News.

Q. What were the names?

A. The "Aguidale" and the "Aguistar," one launched in September of 1918, I think it was, and the other December. I won't be certain of the date.

Q. And the Ward Line had two, did they not?

A. The Ward Line I don't know about, but I know our own; we had two.

By Mr. McGrann:

Q. Those contracts, of course, were made some time preceding that date that you have mentioned?

A. They were made,—those contracts were made in March, 1917, and the contracts at that time were about somewhere between $162 and $165 a ton.

[fol. 606] Mr. Burlingham: Dead weight?

The Witness: Dead weight. They were commandeered and then we got them back, or got them from the government, and had a settlement with the government, and they cost us either $189 or $198. I have got the figures transposed one way or the other. I wish we had never taken them.

Q. I will ask you the same question I asked Mr. Hebble, about this report of Mr. Hurley's which appears in the record of the hearings before the Committee of Commerce and in which his official statement in his official report was that the cost of production to the government, the average net cost per dead weight ton was $180, and ask you if that is a fair figure and if you have any reason to challenge that statement of Mr. Hurley's?

A. Well, I know you would not ask me anything but a fair question; but to answer that intelligently I would have to read the report and find out what he is referring to. If he is bunching his wooden boats and his tug boats and his barges and seagoing ships and everything that is built——

Mr. Burlingham: And concrete ships.

The Witness: And concrete ships, everything built and registered, he might have got down to that figure. I wouldn't like to challenge a man's statement without any knowledge of what he included there, but I do challenge any statements made that the Shipping [fol. 607] Board built steel steamers during the war,—or the Emergency Fleet Corporation built any steel steamers that cost only $180 a ton, and some cost as high as $480.

Q. Would you say that the cost of $220 a ton would be too low for a vessel of about the tonnage of the "Proteus"?

Mr. Burlingham: A freight boat or freight and passenger?

Q. Freight and passenger?

A. I should say it would be even now.

Q. In your table I do not understand why you used $220 a ton then, Mr. Raymond, as to cost of American ships?

A. That is cargo boats.

Q. Was that purely cargo boats you referred to?

A. Yes, sir, cargo boats.

Q. You stated, didn't you, that the average cost of production of Great Britain's Fleet was about $60 a ton?

A. When?

Q. I presume it meant as it existed.

Mr. Burlingham: Before the war?

Q. On this date, February 9, 1920?

A. No, sir, I might have testified that that was the cost of their ships prior to the war; but with the knowledge that we got from Great Britain as to what the government there did in selling their ships and constructing for their account for new parties, it was [fol. 608] around in our money $100 a ton; and that was the recommendation we made to the Senate Committee, to give the American owners a chance to buy ships at $100 a ton and charge the difference up to war emergency.

Q. That was the recommendation made by the Association at that time?

A. Yes, sir.

Q. Have you reason to believe that the price to-day, for instance, will even be less than that?

A. I have.

Q. And how much less would you say?

A. I think it would be even that as taxpayers if they had taken our recommendation. Before they are through they will go down to $50.

Q. The part that I had reference to about the cost of the British Fleet was: "In fact, some of these foreign built cargo steamers were produced in the years before the war at as low a price as $40 a dead weight ton. Great Britain, after all her war losses, still possesses upwards of twenty million dead weight tons of ships that were in service before the war, and the average cost of these vessels, most of which are still good and serviceable, was well below $60 a ton, liners of course not included." That is correct, isn't it?

A. That is speaking of cargo boats, yes, sir.

Q. Do you happen to know the steamers "Beaver" and "Rose City"?

A. I know the "Beaver." I don't know the "Rose City."

Q. You would not agree, I take it, from what you have just testified, that five per cent depreciation of a vessel of the class of the [fol. 609] "Beaver" and "Rose City" is fair to arrive at her value?

A. It all depends upon her upkeep.

Q. And you make that great distinction whether it is 3½ or 4½ or 5 per cent?

A. I do.

January 31, 1921.

Petitioner's Proofs

ROBERT W. MORRELL, called as a witness on behalf of the Standard Oil Company of New Jersey, being duly sworn, testified as follows:

Direct examination by Mr. McGrann:

Q. What is your present occupation, Mr. Morrell?

A. Naval architect.

Q. How long have you been following that profession?

A. Ever since graduation from college.

Q. What date was that, about?

A. In 1909.

Q. What was your college?

A. Cornell University.

Q. Did you get a degree?

A. Yes.

Q. What degree?

A. Mechanical Engineer and Naval Architect.

Q. Then what did you do after leaving college?

A. I was employed for five years by the Newport News Shipbuilding & Dry Dock Company.

[fol. 610] Q. What — the character of the work you did there?

A. Assistant Superintendent of Hull Construction.

Q. Did you have anything to do with values, that is, costs of construction at that time?

A. I was thoroughly familiar with the costs of construction.

Q. And did that include merchant vessels or passenger vessels?

A. It included all types of vessels.

Q. Then what did you do after leaving Newport News?

A. I then entered the employ of the Standard Oil Company of New Jersey in charge of the construction of vessels which they contracted for.

Q. What was the date of your employment by the Standard Oil Company, about?

A. 1914.

Q. And have you been with that company continuously since?

A. Yes, sir.

Q. Just state a little more in detail what work you performed and especially with relation to values or construction?

A. I have charge of the design and construction of all vessels building for the Standard Oil Company, and have to do with the sending out of inquiries for new construction, the receiving of all tenders for such work, and act in an advisory capacity in connection with placing any contracts.

Q. Does your duty involve the value, that is, the cost, of these vessels?

A. Yes, sir.

Q. And in the course of your duties with the Standard Oil Company have you familarized yourself with the cost of production dur- [fol. 611] ing the time of your service and especially during 1918?

A. I kept in touch with the cost of construction at all times and with the values of the vessels.

Q. Have you any information, or did you receive any tenders for construction during 1918?

A. Yes, sir.

Q. And can you state what the cost per ton average of tenders at that time was?

Mr. Burlingham: What class of vessels?

Q. They were tankers, were they not?

Mr. Burlingham: That, of course, is quite irrelevant.

Mr. McGrann: I hope to link it up later on.

The Commissioner: You can go ahead with it for what it is worth.

Mr. McGrann: Your witness testified as to tankers.

The Witness: We received a number of offers for the construction of tankers in 1918. They varied a good deal, but the average was from $190 to $195 per ton dead weight.

Q. And that pertained to tankers I understand, exclusively?

A. Yes, sir.

Q. From your knowledge of shipbuilding and cost of ship construction can you state and will you state what is the relative value as [fol. 612] to a tanker and an ordinary freighter in construction?

A. The tanker is more expensive, being a lighter class and more highly specialized type of vessel. The tanker costs about ten to fifteen per cent more than the freighter.

Q. That is per dead weight ton?

A. Yes, sir.

Q. And similarly are you able to state the relative cost of production of a freighter and a boat which is equipped for both freight and passengers? If so, state what that is?

A. That is very difficult to answer definitely, because a passenger boat brings in a number of variable conditions, such as the number of passengers, the speed, and the type of service which makes it difficult to generalize.

The Commissioner: A freight and passenger boat might be most all passenger and little of freight or most all freight and little passenger?

The Witness: Yes, sir.

Q. Does the passenger and freight boat, that is combined passenger and freight boat cost more than simply a freight boat alone?

A. The combined passenger and freight boat costs somewhat more than the freighter.

Q. What are the elements which enter into that increased cost?

A. Principally the passenger accommodation, also the fact that the passenger boat is usually a faster boat and has more expensive machinery.

Q. Would you say that the number of passengers carried would [fol. 613] be a factor in the case? What I mean is, would the cost of equipping a vessel for a large number of passengers be greater than equipping the vessel for a smaller number of passengers?

A. It would be greater.

The Commissioner: And also the faster it goes the more the machinery costs?

The Witness: Yes.

Q. And I suppose the character of fittings for the saloons and that sort of thing, is that true?

A. That is correct.

Q. I wish you to state what is the practice of the Standard Oil Company in the method of depreciation, and whether or not that accords, so far as your knowledge goes, with the general practice in depreciation of vessels?

A. The Standard Oil Company of New Jersey uses a depreciation of five per cent on the original first cost of the vessels for the first sixteen years. After that they take two and one-half per cent for four years, leaving at the end of twenty years ten per cent of the original value of the ship, which they then dispose of according to the circumstances.

Q. On what is that based? That must be based on some value of the vessel at the end of twenty years. What are the elements which go to make up that depreciation?

A. That is based on the life of the ship and what it might be considered to be worth at the end of that time.

[fol. 614] The Commissioner: You mean to go so far as to say that experience shows that at the end of twenty years vessels are worth in the neighborhood of ten per cent of what they cost?

The Witness: Yes, sir.

Q. Have you been asked by me to give an estimate of what the Proteus was worth based on the assumed reproduction cost and depreciated value?

A. I have.

Q. And have you done so?

A. I have.

Mr. Burlingham: I do not think he is competent to answer that.

The Commissioner: He has not got through yet. He is going to ask him the details. The question as it stands is all right, "have you done so?"

Mr. McGrann: He said "Yes."

Q. Will you give me the figure that you have concluded as to the value of the Proteus in August, 1918?

Mr. Burlingham: I object on the ground the witness has not been shown to be competent to answer such a question. He is a construction engineer, and he has been with the Standard Oil Company dealing in tankers. I don't know that he can apply his experience to this boat.

Mr. McGrann: I think he is as competent as the witness produced by you.

[fol. 615] The Commissioner: Do you know the Proteus?

The Witness: Yes.

Q. Did you come into connection with these boats, the Southern Pacific boats while you were at Newport News?

A. Yes.

Q. In what manner?

A. I had charge of the construction of some of the Southern Pacific boats.

Q. Did the Southern Pacific Company have repairs made at Newport News?

A. Yes, they did a great deal of dry docking and I saw their vessels come in constantly and I was in contact with them frequently on dry dock work.

Mr. Burlingham: What does he mean by being in contact with them frequently? Did he see them on the docks?

Q. Were you supervising repairs?

A. I had nothing to do with repairs.

The Commissioner: He said that he was familiar with the cost and kept in touch with costs. Perhaps he could say if he knows what the Proteus cost, if he knows what it would have cost to reproduce it and how old it was, etc.

Q. Have you studied the Proteus recently, the design of the Proteus recently?

A. Yes, sir.

Q. Are you familiar with her gross tonnage and her dead weight [fol. 616] tonnage and with her length and beam and depth?

A. I am.

Q. And the character of the vessel she was?

A. I am.

Q. Are you familiar with the fact that it has been testified she was re-boilered in 1909 by the Newport News Shipbuilding & Dry Dock Company at a cost of about $90,000?

A. Yes, I know that.

Q. And have you taken all this into consideration in giving your estimate which I am about to ask you?

A. I have.

Q. And what else did you take into consideration, what other element have you had?

A. My knowledge of the relative cost of construction at the time the Proteus was built and at the time she was sunk.

The Commissioner: Do you know how old she was when she was sunk?

The Witness: She was about eighteen years old.

The Commissioner: Did you take that fact into consideration in any way?

The Witness: I did.

Mr. McGrann: I will elaborate that after he gives it, how he has arrived at the figure.

Mr. Burlingham: What is your question? What is the question that you are asking, how much it would cost to reproduce?

[fol. 617] Q. The question was, will you give me the figure that you have concluded the value of the Proteus to be in August, 1918?

The Commissioner: Objection overruled.

A. $630,000.

Q. State for the record just how you arrived at that figure?

A. I started by taking the cost of reproduction in 1918, and I took as that figure——

The Commissioner: Suppose you tell us what that was.

The Witness: That was $1,670,000.

Q. I think the Commissioner wishes to know, too, how you got that cost, how you arrived at that cost?

The Commissioner: Yes.

Q. What was the ratio, in other words, that you used between the original cost in 1900 and the reproduction in 1918?

A. I arrived at that figure by taking the relative cost of construction in 1900 and in 1918.

The Commissioner: I don't know what you mean by that.

Q. Explain that.

The Commissioner: You do not mean simply that that is what it [fol. 618] would have cost to build a new Proteus at the time she was lost, do you?

The Witness: In 1918 I estimated it would cost $1,670,000 to build a new Proteus.

The Commissioner: That is quite regardless of what it cost originally, then?

There is no relativity involved?

The Witness: The estimate of the cost in 1918 is based on the increase in the cost of construction.

Q. Then did you reduce that in any way, and if so, how?

A. That figure was depreciated by taking the figure of four per cent from 1900 until 1914, and two and one-half per cent from 1914 until 1918. That gives me a depreciated value of $568,000. To that, the consideration of the vessel having been reboilered in 1909, I took the $90,000 cost of reboilering and depreciated that at four per cent from 1909 to 1914, and at two and one-half per cent from 1914 to 1918. That depreciated value was added and gave the final figure of $630,000.

Q. Can you state what the average depreciation would be from this method that you have used throughout the period of eighteen years? I wish to know what the average would be?

A. That would work out about three and one-half per cent.

[fol. 619] Cross-examination by Mr. Burlingham:

Q. The Standard Oil Company has no passenger boats?
A. No, sir.
Q. And never has had?
A. Not so far as I know.
Q. They do not buy any boats, they build them, don't they?
A. We have bought some vessels.
Q. When, since you have been with them?
A. We bought several freighters.
Q. When?
A. In 1914 we bought the steamer Westoil.
Q. What was her tonnage?
A. She had a dead weight of about 3,000 tons.
Q. A small boat?
A. Yes.
Q. About how long?
A. About 250 feet.
Q. Whom did you buy her from?
A. A concern on the Lakes.
Q. A Lake-built boat?
A. Yes, sir.
Q. What other boats have you bought?
A. You are referring to any vessels that have been purchased other than by construction?

Q. Yes, since you have been with them?
A. The steamer Palacine.
Q. When?
A. 1915.
Q. From whom?
A. I cannot give you the name of the former owner.
Q. Her dead weight tonnage?
A. About 4,000.
Q. Lake-built?
A. No, British-built.
Q. How old was she?
A. She was about ten or twelve years old at the time.
Q. Any others?
A. The steamer Retlaw.
[fol. 620] Q. When?
A. About the same time as the Palacine.
Q. From whom?
A. I cannot recall the name of the former owner.
Q. Her tonnage?
A. About 4,000.
Q. Another small boat?
A. Yes, sir.
Q. What do you use her for?
A. Case oil.
Q. In what trade, Eastern?
A. To South America principally and to France.
Q. Any others you bought?
A. We bought a vessel last year.
Q. 1919?
A. Yes, sir.
Q. Or 1920, which?
A. 1920.
Q. What boat?
A. Monmouth.
Q. From whom?
A. I cannot give you the name.
Q. Her tonnage?
A. About 6,500 tons dead weight.
Q. Age?
A. About eighteen years.

Mr. McGrann: What was the date of that last purchase?
Mr. Burlingham: 1920.

Q. What part of 1920?
A. Early in 1920.
Q. You bought nothing in 1917 or 1918?
A. We did not, although we had a number of offers.
Q. You didn't sell any boats during that time?
A. No, sir.

Q. You really had nothing to do with the purchase and sale of boats for the Standard Oil Company except to give your opinion as to [fol. 621] the character of construction, etc., did you?

A. I have to survey the vessels and determine as to their condition and whether they are worth the price at which they are offered.

Q. And do you try to keep familiar with the sales of other vessels outside, not tankers?

A. In a general way, but not in detail.

Q. You are not at all interested in those freight and passenger boats, are you?

A. Only in a general way.

Q. You are not at all interested in the cost of constructing freight and passenger vessels, are you? You have not been since you have been with the Standard Oil Company during the last six years?

A. Not in any detail.

Q. I don't know what that means, "not in any detail." You are only interested as a citizen and engineer, is that what you mean?

A. As a professional man I am interested in those matters as part of my profession.

Q. Of course you know that since 1914, or after 1914 there was an enormous rise in the cost of construction and the value of shipping all over the world, don't you?

A. I know there was a rise.

Q. And people were paying almost fabulous sums for boats here in 1916, weren't they?

A. They were paying high prices, yes, sir.

Q. When you were with the Newport News Shipbuilding & Dry Dock Company just what was your business, supervising the construction of hulls?

A. Yes, sir.

[fol. 622] Q. Chief?

A. Assistant Superintendent.

Q. To whom?

A. To the superintendent, Mr. Lofland.

Q. He was the chief constructor, was he?

A. Outside in the yard, yes.

Q. Who was inside, was anybody superior to him?

A. Well, I would have to explain the entire organization. There was a general manager who was over the superintendent, and there was a president and vice president over the general manager.

Q. And were you outside in the yard?

A. Yes, sir.

Q. Actually superintending the construction, the physical construction of the boats?

A. That is right.

Q. Was it any part of your business there to estimate the cost of construction? Wasn't that done inside?

A. The estimating is done in the office, but the cost of construction is a part of the duties of the outside force because they have to keep the costs within the estimate.

Q. But they are given the specifications and they know what the tender or bid of the Newport News Shipbuilding & Dry Dock Company was for the work, and I suppose the outside men's only job was to see that the work was properly done and that the company did not lose any money?

A. The work has to be done within the estimate which is fixed, and with which we are entirely familiar.

The Commissioner: And you kept track of the actual cost?

The Witness: Yes, sir.

[fol. 623] Q. In 1914 was construction at a low ebb, or had it begun to rise then?

A. In 1914 it was at a low figure.

Q. And when did it begin to rise?

A. Immediately after the declaration of war in 1914.

Q. And what time of the year did you leave the Newport News people?

A. In the fall.

Q. And had you any further direct interest in the question of the cost of construction of freight boats and freight and passenger boats from that time on?

A. Not direct, no.

Q. Did you build any tankers during the war?

A. Yes.

Q. How many?

A. I would have to count them up.

Q. About?

A. There must have been about eighteen.

Q. And you had different yards at work on those?

A. Yes, sir.

Q. You didn't build any yourselves?

A. No.

Q. And did the prices vary?

A. They did.

Q. How high did they run?

A. The highest we have paid is $200 a ton dead weight.

Q. When was that?

A. That was in—are you speaking of the war period now?

Q. Yes.

A. Then we didn't pay $200 a ton during the war period. It was after the war we paid that. The highest we paid during the war was about $190 a ton.

Q. After the armistice prices still remained very high, didn't they, for the construction of vessels?

A. Yes.

[fol. 624] Q. And continued to be high until the latter part of 1919, is that correct?

A. Yes.

Q. Did you yourself happen to hear of any of these sales at very high figures during that period after the war?

A. I have heard of some sales.

Q. These fly-by-night companies were in the market and bought anything they could find at any price that a ship owner would accept, isn't that so, during that period?

A. There were a few such sales.

Q. Tankers were very greatly in demand, were they not?

A. Yes.

Q. Do you know of the price of the sale of any tanker after the armistice, what was paid? Not for construction but for sale?

A. I know of a few.

Q. How high did they go, up to what?

A. The highest that I have heard of have been $220 a ton dead weight.

Q. Were those sold to you or by you?

A. No, sir.

Q. Outsiders?

A. Yes.

Q. At what period was that when tankers were being sold or a tanker was sold for $220 a dead weight ton?

A. That was in 1919.

Q. What part of the year?

A. I cannot state exactly, but it was somewhere in the middle of the year, I imagine.

Q. Did you keep yourself acquainted with all those sales, or did this happen to come to your attention?

A. Simply by perusing records of sales. I didn't keep the record myself

[fol. 625] Q. You got at the assumed cost of reproducing the Proteus in 1918 by comparison with her cost in 1900, is that what I understand you to say?

A. That is correct.

Q. You added a certain per cent for it, did you?

A. Yes, sir.

Q. How much?

A. I assumed that the cost of construction had increased as a maximum about three times.

Q. Were you informed by Mr. McGrann, or any one else as to the cost to the Proteus in 1900?

A. Yes, sir.

Q. What did you assume it to be?

A. $557,600.

Q. And you multiplied that by 3?

A. Yes.

Q. You had no occasion in 1918 to inquire into the reproduction cost of such a steamer as the Proteus, did you?

A. I will answer your question—no, I did not.

Q. You were not interested in that class of vessel at that time?

A. I was interested in construction cost in general sufficiently to know how much it had risen.

Q. Well, Mr. Frank Martin, I think it was, took as the estimated cost of constructing the Proteus in August, 1918, the sum of

$1,750,000, which is only, I think, $80,000 less. You would not wish to be bound down to a few thousand dollars in your estimate, would you?

A. I feel that I have taken an outside figure in making that estimate.

Q. And why do you fix the percentage of depreciation at four [fol. 626] per cent in the case of the Proteus when you say that the Standard Oil Company habitually writes off five per cent every year for the first sixteen years?

A. I took four per cent because I took into consideration the recognized life of vessels of that type and owned by that company and their up-keep.

The Commissioner: You took into consideration the fact that they were supposed to keep their vessels in fine condition?

The Witness: Yes.

Q. They have that reputation?

A. Yes.

Q. And you from your experience at Newport News saw that that reputation was well deserved, did you?

A. That is correct.

Q. This question of depreciation is rather a matter of convention of bookkeeping, the estimate of one company, and the methods of one company differ from another company, don't they?

A. To some extent. It also depends on the physical condition of the vessel.

Q. You don't mean to say that a writing off of five, four, three and one-half of two and one-half per cent really indicates the percentage of depreciation in the value of the vessel for purposes of the market, do you?

A. That is the best indication we have of it.

Q. Have you a familiarity with the methods adopted by steamship companies in this country as to writing off the value of ships?

A. Yes, sir.

[fol. 627] Q. What companies do you know of besides the Standard Oil Company?

A. Why, the Shipping Board. I know the method they have used.

Q. We all know that, but it is not a model, is it?

A. I am not here to criticise the Shipping Board.

Q. What steamship company do you know, or are you familiar with or have enough familiarity with to say what it marks off each year on its books to represent the depreciation in value of a ship? What particular company do you know?

A. I cannot name any companies in which I am specifically informed as to their bookkeeping methods, but I do know the general method by which the depreciation is written off in a general way.

Q. I am not asking you about anything in general, I am asking you something specific. Do you or do you not know any steamship company in this country well enough to say what it writes off each year to represent the depreciation in value of its ships?

A. Not as to individual companies, no.

Q. And what is this general knowledge that you assume? What is this general principle that you assume, what is it based on, what is it?

A. Part of it is based on the testimony in this case. Mr. Martin, for instance, has taken five per cent. Mr. Raymond has taken three and one-half to four and one-half per cent.

Q. You read Mr. Raymond's testimony?

A. I did.

[fol. 628] Q. You remember that he said there was not any general principle, don't you?

A. I remember that he used some figures.

Q. Answer the question. You remember that he said there was not any general principle?

A. No, I don't remember that.

Q. Do you maintain that after twenty years a boat is actually worth only ten per cent of her original cost?

A. I believe that she may be only worth that.

Q. How is it, then, that this boat, the Proteus, which costs $556,000 is worth in your judgment not $556,000 but $630,000 if your principle is correct?

A. Because I have taken into consideration the war conditions.

Q. We don't want your generosity, Mr. Morrell. You are testifying to what you suppose are facts and what you believe. I just asked you whether a boat was worth after twenty years only ten per cent of her value. Do you maintain that as a proposition in any case, whether there is a war or whether there is anything else or not?

A. No, I maintain that that is subject to a number of conditions which may affect it.

Q. And your guess is she would be worth $630,000 instead of $556,000, is that it?

A. That is my opinion.

Q. Have you ever been called on before to testify as an expert on the value of vessels?

A. No, sir.

Mr. Burlingham: That is all.

[fol. 629] Redirect examination by Mr. McGrann:

Q. If you had assumed five per cent instead of four per cent for the depreciation, can you state what would have been the result in your calculation? Assuming that you had taken five per cent for the first fourteen years, just state for the record how that would have affected the result?

A. It would have given a much lower final valuation.

Q. Can you figure that out?

The Commissioner: It would be the difference between four per cent and five per cent.

Q. Please work that out?

Mr. McGrann: I call for the production of the contract between the Railroad Administration and the Southern Pacific Company covering particularly the Proteus.

Also I call for the production of the books of the Southern Pacific showing the depreciation used by that Company and the value of the Proteus as fixed for the Proteus during August, 1918.

Mr. Neeley: And showing the value?

The Commissioner: The value of the Proteus as it appeared on the books.

Mr. McGrann: As fixed by the company. Also I call for all in-
[fol. 630] surance policies which have been written for the Proteus during this period which would show the insured value of the Proteus, and I have already called for the plans which I believe you are going to produce, and the extracts of the log, or some extracts.

Q. What is the figure you have finally?

A. It would reduce the value by $67,000.

Q. I want the figure you finally found?

A. The final value based on five per cent instead of four per cent?

Q. Yes, based on five per cent instead of four per cent, as you have taken on your original calculation.

Mr. Neeley: Five per cent for the whole twenty years?

Mr. McGrann: No, five per cent for the four.

The Witness: That would make it $564,000 instead of $630,000.

[fol. 631] February 3, 1921.

Horatio G. Gillmor, called as a witness on behalf of the Standard Oil Company of New Jersey, being duly sworn, testified as follows:

Direct examination by Mr. McGrann:

Q. What is your present occupation, please, Captain?

A. I am a naval constructor of the United States Navy.

Q. Are you a graduated naval captain?

A. I graduated from the naval academy in 1891.

Q. What other training did you have, in an educational way, following your graduation from the naval academy?

A. Subsequent to graduation I was sent by the Navy Department as a private student in the British Royal Naval College at Greenwich, England, to take the course in naval architecture which their naval constructors take.

Q. And how long was that?

A. Three years, from 1891 to 1894.

Q. Following that, just tell us what your experience was?

A. I went to the Navy Yard, Brooklyn, in the Construction and Repair Department remained there about a year, as I recall it.

Then I went to sea on the staff of the Admiral of the North Atlantic Fleet for about a year; from there to the Bureau of Construction and Repair for about four months.

Q. That is in Washington?

A. Washington, D. C., Navy Department. From there to the [fol. 632] works of the Herreshoff Manufacturing Company, Bristol, Rhode Island, to superintend the construction of some torpedo boats; from there, on the completion of those boats, I went back to the Navy Department, Bureau of Construction and Repair. I was there during the Spanish-American War. At the conclusion of the Spanish-American War I was sent to the works of Sir G. Armstrong Whitworth & Company, Newcastle-on-Tyne, to superintend the construction of a vessel on contract which we purchased from the Brazilians.

Mr. Burlingham: A war vessel?

The Witness: A vessel then known as, I can't remember the name; she was subsequently known as the "Albany," a cruiser. On completion of that duty I returned to the Navy Department, Bureau of Construction and Repair; was there a year or more, and was then sent to the works of the Bath Iron Works, of Bath, Maine, to superintend the construction of a number of vessels under construction at that time. On the completion of the "Georgia," the biggest of the vessels, the battleship, I was transferred to the works of the Fore River Shipbuilding Company, at Quincy, Massachusetts, as superintendent of construction. After something more than three years there I was sent to the Bureau of Construction and Repair, Navy Department, Washington. I remained there some time and then [fol. 633] was sent to the Navy Yard, Norfolk, Virginia, as head of the Construction and Repair Department there in charge of the Construction and Repair Department there. January, 1915, I was sent from Norfolk, Virginia, to Washington, D. C., ordered to report to the Attorney General to assist in the defense of some suits before the Court of Claims pending. In connection with that duty about—shortly after the outbreak of the European War, I was made a member of what was then known as the Joint Army and Navy Board, inspecting and classifying merchant vessels, and was subsequently in connection with the other duties named, given duty in connection with the Board of Inspection and Survey, Navy Department, and subsequently, still in addition to the duties previously mentioned, made a member of the board appointed by the President of the United States known as the Board of Appraisal of Merchant and Private Vessels; thereafter made a member of what is known as the Board of Review, the duties of which are to arrange adjustment with owners whose vessels were chartered during the war, and arrange for resale of vessels to their former owners where such owners desired to repurchase them and where the vessel was taken under the statute authorizing seizure or commandeering. All of the duties last named I am still engaged upon.

[fol. 634] Q. Now, to return to the Army and Navy Board, is that also known as the Joint Merchant Vessel Board?

A. The name of the board which I referred to a little while ago as the Joint Army and Navy Board is now known as the Joint Merchant Vessel Board. Its title was changed because of confusion, because of another board in existence.

Q. Where does that board sit?

A. That board sits in Washington.

Q. And will you state a little more explicitly what the functions of that board are or were?

A. At the time the board was organized, it was seen that there was a possibility that we might be drawn into the war, and the board was organized for the purpose of making surveys of everything flying the American flag, with the view to seeing where the vessel property could be best used in the event of our being drawn into the war; what the several vessels were suitable for and what, if any, alterations would be necessary in them in order to make them serviceable for either army or navy use, and what the property, if acquired, should cost either the War or the Navy Department if they sought to acquire it. At the time the board was organized there was no specific provision of law for commandeering.

Q. In the course of the duties which you performed in connection with the board, as a member, did you have occasion and did you inspect merchant vessels?

A. Yes, I inspected a good many merchant vessels personally, and have, since the time when the volume of work became so great that [fol. 635] it was necessary to have more assistants than we contemplated, supervised the reports made by others upon their personal inspection of such vessels.

Q. Did you inspect the steamship Proteus of the Southern Pacific Company?

A. Yes, I personally inspected the Proteus on or about the 26th day of May, 1916, as a member of the Joint Merchant Vessel Board.

Q. Will you state briefly what the scope of your inspection was?

A. Well, the inspection, of course, was conducted primarily to ascertain what use the Proteus could be put to by either the army or the navy in the event of need. The inspection, of course, went to the condition of the vessel, and in connection with the inspection we put a value on her; that was not the primary purpose of the inspection but was one of the things that resulted from the inspection, and one of the duties imposed upon the board in connection with the inspection.

Q. Are you familiar with the design and construction of the Proteus as she was at that time?

A. I made a very careful inspection of her and procured the plans of her, filed the plans after the inspection was completed with the department that would have the alterations to make for naval purposes, had we taken her for naval purposes.

Q. Now, I should like to have you state a little more specifically, also, what was the scope of the work of the Board of Appraisal?

A. The precept of the Board of Appraisal required us to ascertain [fol. 636] the just compensation to be paid for such vessels as might

be or have been taken by the Navy Department under the authority of the President and under an act approved, I think, June, 1917. It also appraises vessels which had not been commandeered and which we did not know, had no reason to believe, would be commandeered at the time the appraisal was made on request of the Navy Departm-nt.

Q. What was the membership of that board at that time?

A. That board was presided over by Captain A. S. Halstead, now Rear-Admiral; I was the next senior member. Originally there was a Commander Kalbfus, I forget his initials; I think he is now Captain. There were three civilians: Mr. Stevenson Taylor, Mr. Daniel Bacon and Mr. A. L. Swasey, a total membership of six.

Q. Do you know what Mr. Stevenson Taylor's position was at that time?

A. He was president of the American Bureau of Shipping; a director or president of Webb's Academy and Home for Shipbuilders, and, I don't know, I believe he was director of several other companies; I don't know what they are. He was given a commission in the Naval Reserve.

Q. Of what rank?

A. Originally with the rank of Lieutenant Commander; afterwards promoted to the rank of Commander.

Q. Was Mr. Daniel Bacon a practical shipping man?

A. Mr. Bacon has been a ship owner and operator of many years' experience. He was interested, before becoming a member of this [fol. 637] board, in two shipyards in Chester. I think he had disposed of his interests in those about the time that he became a member of this board, or shortly after.

Q. And how about Mr. Swazey?

A. Mr. Swazey is a graduate of the Massachusetts Institute of Technology as naval architect, had been a designing architect for a number of years and was, at the time of his appointment, president of the Heerschaft Manufacturing Company, a builder of yachts and speed vessels. He, however, resigned his position as president of the Heerschaft Manufacturing Company at the time of his appointment to this board.

Q. Those gentlemen were also commissioned, were they?

A. Each of the three men from civil life were given commissions in the Naval Reserve as Lieutenant Commanders.

Q. How many vessels did this board appraise?

A. Well, I have never looked it up; I know it is more than two thousand of all kinds.

Q. Did you personally take part in the appraisals of that number of vessels?

A. I was present at all of the meetings except those for about one week or ten days, in April, 1917. I was off duty for ten days, I think a week or ten days, in April, 1917, but I have been present at all other meetings of the board.

The Commissioner: When you say you were present at the meetings of the board you mean you took part——

The Witness: Participated in the appraisals.

[fol. 638] Q. Now, can you give us approximately the number of vessels which you appraised for the Joint Board of which you have spoken?

A. The Joint Merchant Vessel Board? I don't believe I could even approximate that. You see, we are still working on that. As vessels come out we inspect them and classify them, and I don't think I could approximate that.

Q. Well, I mean was it in the hundreds?

A. Yes, it would be in the hundreds.

Q. Now, were you connected with the Department of Justice, you say?

A. My orders, when I left Norfolk, were to report to the Attorney General, and I had no other duty for about twelve months excepting advising and assisting in the defense of some suits.

Q. Did that special work of yours with the department require that you should appraise vessels or have any connection with the valuation of vessel property?

A. Well, it had connection to the extent that the question at issue in all of them was value, either of a vessel built—when I say "value" I mean cost, in the earlier cases in which I was connected, the cost to the builder of the vessel proper, and the cost of alterations made by direction of the department in suits upon which I am working now and spending more time—the question at issue was what is the just compensation in each case.

Q. Counsel has just suggested that the duties as you have defined them were to ascertain just compensation, or perhaps first cost. Did your duties also involve what I might call the present value of the [fol. 639] property?

A. There are two classes of cases that I have worked on and will have to work on: one class of case is just compensation cost, and in those cases the question at issue is as to the value of the property at a certain date, not in any case the present date; the other class of cases has no real, direct relation to just compensation, they relate to what a builder of a vessel is entitled to in certain circumstances, the question of cost to him being a very essential element in that.

Q. Now, in the performance of your duties with these several boards and with these two boards, and with the department, have you familiarized yourself with the going costs, that is, the production costs and values of floating of vessels?

A. Well, of course it has been my aim for the past six years to keep very familiar with mostly the cost and value.

Q. And have you had access to all sources, I might say, of the United States, in ascertaining these values?

A. I have had access to a good many things that I would not like to talk about in connection with it.

Q. Now, to come down to the Proteus, in particular, the question here is, Captain, what the value of the Proteus would be as of August, 1918, that vessel having been a total loss at that time. Have you considered at my request that value?

A. I have.

Q. Have you arrived at any figure which you think would express the value?

A. I have.

[fol. 640] Q. What is that figure, please?

A. I think $650,000 would be an outside value for the Proteus, as of August, 1918.

Q. Now, will you state a little more specifically and in some detail on what you would base that valuation?

A. Well, I approached it in this way: I went over the Proteus pretty carefully in 1916, and in 1916 I placed a value on the Proteus that I thought was a fair value and one at which the United States should be able to acquire the vessel under the conditions existing at that time. There was a perfectly free market then for vessels like the Proteus, no restrictions on transfer either of ownership or flag, and I thought that at that time the Proteus was fairly worth $625,000. Subsequently I carried forward in my mind the events and their effect on values from that time to August, 1918, and while there was undoubtedly an increase in value as judged by market price between May, 1916 and—March was the first statutory provision that affected value but there were others which, I think the most effective of which, I mean the one having the most effect of which was the statute of June.

Mr. Burlingham: June of 1917?

The Witness: June, 1917, which did affect that.

Mr. Burlingham: Hadn't you better state what that statute refers to?

The Witness: That was a statute that permitted the United States [fol. 641] to take possession of any piece of floating property, whether complete or incomplete, and to take possession, either take title or take use. Those statutory provisions affected value and they reduced the value of all vessels to which they applied. The free vessels, what may be termed "free" vessels, that is, vessels which were without restrictions, were worth more than vessels duplicates of the free vessels but subject to these restrictions. Taking the effect of that into consideration and considering the market as it was up to the time that these restrictions came into effect, I arrive at $650,000 as being, in my judgment, a fair value as of August, 1918. Then I took the cost of reproducing the Proteus as of August, 1918, and taking into consideration the fact that some work in the nature of replacement had been done upon the vessel, I took the cost of replacement as of that date, and, using the depreciation table which was used by the Board of Appraisal for Merchant and Private Vessels and depreciating the unreplaced portion—if that is a proper expression—and the replaced portions separately in accordance with their age, I arrived at a figure based upon reproduction cost as of August, 1918, less depreciation; and considering that figure and necessarily controlled in part by the course of events since August, 1918, I felt that the figure arrived [fol. 642] at in that way, due regard being had of the characteristics of the Proteus affecting her merchantability, that even with that as the basis, that $650,000 was an outside value.

Q. What was this depreciation table that you speak of?

A. That was a table adopted by the Board of Appraisal at one of its very early meetings. It was presented to us by Mr. Stevenson Taylor and had been used by him for a number of years in a great many appraisals covering a very wide range of vessels, and we discussed it and agreed that it was the proper table for us to adopt as a guide in appraising vessels of varying ages.

Q. Are you able to state the exact figure that that table indicates for an eighteen-year-old vessel?

A. An eighteen-year-old steel vessel which had been well maintained would, according to that table, be worth, when she is eighteen years old, decimal four, five, two (.452) of her first cost.

Q. Captain, are you familiar with any other tables of depreciation which you know have been used and by whom used?

A. I don't know that I have seen them or used them in the form of a table. I know that some owners depreciate on the basis of a percentage of the depreciated value year by year. In connection with the work that I have been doing for the Department of Justice, I know that some ship owners make that practice and it would work out a little differently at certain points in the age of a vessel than [fol. 643] this depreciation, when worked out in accordance with the table which we used.

Q. When you say "which we used" do you refer now to the Board of Appraisal?

A. I mean which the Board of Appraisal, the Joint Board of Merchant and Private Vessels, used in making its recommendations as to just compensation.

Q. Captain, there has been some testimony in this case previously concerning the subject of depreciation and on what it might be considered to be sounded. Will you state your views on that please; why is there depreciation, in other words?

A. My understanding of depreciation in its relation to vessel property is that it is an element which any prudent owner of vessel property, not wishing to deceive himself, has got to take into account year by year in order that he may have a proper knowledge of the value of his property, and my understanding is that, based on the experience of certainly several generations, it is possible to state with reasonable accuracy the fair value of well-maintained vessel property in terms of its age, and that that is what the depreciation table aims to do.

The Commissioner: That is, assuming you've got the element of supply and demand fixed otherwise?

The Witness: Well, year in and year out, supply and demand, while it fluctuates, take it over any given period of reasonable length and the depreciation table will provide for the average value over [fol. 644] the period. There will be times when vessels will bring more than their depreciation value; there will be other times within a period when they will bring less than the depreciated value.

Q. Now, I ask you if the value which you have given here as the outside value, by which I understand you mean the maximun?

A. I mean the upper limit of value.

Q. The upper limit. If you were asked, in other words, to sit on the Board of Appraisal and appraise, would you, first, use any other method than you have used here as you have described and, second, would you give the Proteus any different value than that which you have testified to?

A. The only thing that would affect that—if I was sitting on the Board of Appraisal—would be evidence produced by the owner as to the earning value of that vessel over a period of three to five years before the date of fixing the value. That would, I think, in cases of just compensation, be one of the things that would necessarily have to be considered in arriving at the value.

The Commissioner: Would it come in with the cost of production at all?

The Witness: With which we consider the characteristics of the vessel as affecting its marketability; the age of the vessel; the use to which the vessel had been put in the hands of the owner while in [fol. 645] the possession of the owner before taking; what he could prove to be the earnings while in his possession for a period of from three to five years.

The Commissioner: The demand would be affected by the earning power, wouldn't it?

The Witness: In the end the demand and the earning power are so related that where earning power is high demands is almost invariably high, and where earning power is low the demand is low.

The Commissioner: That is what I mean, that earning power is a necessary factor.

The Witness: In a measure, it is related to demand, the earning power.

Mr. Burlingham: When you gave characteristics, age, use, earnings for three to five years; is there anything else that you want to add?

The Witness: Betterments made, character of the maintenance and amounts expended on maintenance, and I believe those were—I think that covers the elements that we made it a rule to inquire into and weigh.

Q. What I am trying to ascertain is whether or not this valuation, maximum of $650,000, would, in your estimation, be approximately, or nearly, or exactly the value that the Board of Appraisal would place on this vessel?

[fol. 646] A. I think that would be pretty close to the value that the Board of Appraisal would have placed on the vessel.

Cross-examination by Mr. Burlingham:

Q. You think one fair way of ascertaining the value of a merchant vessel at a particular date during the war was to ascertain what it would cost to reproduce her and then allow for depreciation on account of age?

A. Well, that would not be an invariable rule, I mean a rule that you could follow invariably.

Q. I did not ask you that, you know. Repeat the question.

(Question repeated.)

A. That would be one fair way for some merchant vessels.

Q. How would it be for the Proteus?

A. Well, I think that the question of the general characteristics as affecting the merchantability of the Proteus comes in here.

The Commissioner: The merchantability.

The Witness: By that I mean, assuming that you had a very good line on the market for tramps, and had to judge of the value of the Proteus from the market for tramps, you would have to take into account the peculiar characteristics of the Proteus which differentiated her from the tramps and whether that made her more valuable, that [fol. 647] is, more readily marketable, or less readily marketable than the tramps.

The Commissioner: But you are assuming a standard that the Proteus did not take?

The Witness: Yes, the Proteus is a special vessel. You had to allow for the fact that the Proteus was a special vessel.

Q. Well, I repeat my question. Would that be one fair method at arriving at the value of the Proteus during the war?

A. That would be a fair method if you took into consideration, as I said before, the characteristics of the Proteus.

The Commissioner: That is to say, if it was a fair method.

Q. What did you assume to be the cost of reproducing the Proteus?

A. I assumed the cost of reproducing the Proteus to be two and one-half times her first cost.

Q. What was her first cost?

A. $557,000; I was informed that that was her first cost.

Q. Well, if my figuring is correct, that would make the cost of reproduction $1,392,500. Is that figure, two and one-half times, purely arbitrary?

A. No, I arrived at that in part in this way: the statistics as to average commodity prices were consulted.

Q. You mean for wheat and that sort of thing?

A. Well, I consulted, among other things, the Department of [fol. 648] Labor's tabular statistics with reference to all commodities, and among them classified you will find steel and the products of steel. Now, they enter into the construction of the Proteus to probably at least seventy to eighty per cent of her material used in the course of construction. Another commodity classified is lumber and lumber products which enters for certainly another twenty per cent into the construction of the Proteus. I consulted the average for all commodities. Now, the statistics show that commodity prices, for steel, for example, taking 1913 as 100, or par, in August, 1918, steel and the products of steel were 185 per cent, and lumber and lumber products were as of that date 157 per cent, and all commodities, the average of all commodities as of that date, were 202 per cent. Now,

the material that went into the Proteus represented not less than fifty per cent of her cost, and if you make due allowances for labor and for profit, in my judgment two and one-half times the first cost would be a liberal reproduction cost of the Proteus, assuming that you could build her at that time.

Q. Wouldn't it perhaps be a more satisfactory method to ascertain from a ship yard how much it would cost to reproduce her?

A. Well, it would if you could get the real figure from the ship yard, but they were all at that time in such a situation that they could not build for anybody but the United States, and any figure that they gave depended entirely on who they were giving it to.

[fol. 649] Q. Well, assuming that they were reasonably honest, don't you think you could get an estimate from a company like the Newport News Ship Building and Dry Dock Company that would be as fair as anything that you could arrive at by a study of the statistics of the departments of the Government as to the prices of wheat and steel and so forth?

A. Well, I can only say that we found it necessary to discount the statements that builders presented to us. We did not have any from Newport News, as I recall it, but we did from others and, using our best judgment, we had to discount their statements.

Q. Well, I took them only as an example, but there are many other builders, and I suppose some of them are fairly honest—Cramp's, New York Shipbuilding Company, and so forth?

A. Without questioning the integrity of the builders, I give it as my belief that if a former client or customer came to them in 1918 for a price on a vessel which was a duplicate of one they had formerly built, that they would make the price very liberal, I mean from the point of view of high price.

The Commissioner: Do you mean there would be a small amount of profit or would they stick it on?

The Witness: No, they would stick it on. They would make the price considerably bigger than they expected to close for, if they were free to close—and they were not.

[fol. 650] Mr. McGrann: In your answer did you refer to the Board of Appraisal when you said "we"?

The Witness: Yes. We had a number of cases in which letters were produced before us, letters of builders stating that, under the circumstances, they could not undertake to enter into a contract, but that if they could the price would be so much.

Q. Have you been referring in all your testimony to the Joint Army and Navy Board or Joint Merchant Vessel Board, or to another board also?

A. Where I have referred to value or just compensation I have generally referred to the Board of Appraisal for Merchant and Private Vessels, where I have mentioned board.

Q. Has that the same personnel—yourself and Captains Halstead and Kalbfus and Messrs Taylor, Bacon and Swazey, is that the one?

A. That is the board, yes, that had to do with just compensation.

Q. That was appointed by the Secretary of the Navy?

A. No, that was appointed by the President of the United States.

Q. Under any act?

A. Under an act approved June 17, 1917; I think that is the date of approval.

Q. In order to advise the President or his representative as to what you thought was just compensation for a vessel requisitioned or to be requisitioned?

A. That is it.

Q. And so that, in case she were lost, torpedoed, or sunk, you would [fol. 651] have some standard for settlement with the owners?

A. Where use of the vessel or her charter was commandeered, it was the duty of this board to advise the President or his representative as to the just compensation for use, and to fix, also, a value which would apply as an insurance value in the event of the vessel being lost while in possession and use by the Navy Department.

Q. Well, this is a one-sided board; the owners of the ships had no representation on it?

A. No representation on the board but they were given every opportunity to be heard and present anything they liked.

Q. Oh, no doubt you meant to be very fair; I don't question that. But there was no agreement on the part of owners that they would take your judgment, or the judgment of the board, as to the value of their property?

A. No.

Q. They had the alternative that they could go into the Court of Claims and take it out of the Government if they could get it?

A. They have, and I think to date eight of them have done so.

Q. And do you know the reason for that?

A. Well, I assume that if we erred we erred on the side of liberality.

Q. Do you think it is due to the fairness of the board rather than the fact that the Court of Claims is about the worst court to go into in the world, do you?

A. Well, I am not here to comment upon the Court of Claims.

Q. Now, was there a different personnel for the Joint Army and Navy Board?

A. Entirely different.

[fol. 652] Q. Were you on that?

A. I was. I was the only man who was on both.

Q. And were the members of that board all navy men?

A. All but one, who was an army man.

Q. And that was for a slightly different purpose, was it?

A. The purpose of that board was, as I stated before, primarily to find out where each of the several merchant vessels would fit into either the navy or the army board.

Q. It was not so much for value as it was for usefulness?

A. Chiefly for usefulness; we were, however, to get, as close as possible, what the vessel should be acquired for in the event of its being taken.

Q. So that, in addition to giving the age, tonnage, dimensions and

condition of each vessel inspected, you added as an interesting, additional fact what you thought she was worth?

A. That's it.

Q. If the Government wished to buy her or requisition her?

A. Estimated value we call it.

Q. That board came into existence before the other board?

A. Yes, sir.

Q. After the legislation had been enacted by Congress which gave the President the power to commandeer vessels, then you were asked to fix values in case of loss and so forth?

A. Yes, sir.

Q. Now, there was another board which I think sat here in New York, on which Mr. Frank S. Martin sat and Judge Cohen was the chairman—what was that?

[fol. 653] A. That was a board appointed by the Admiralty Division of the Shipping Board.

Q. And when vessels were lost during the war the owners went before that board and presented their claim, and that board made a report on how much compensation should be paid by the Government?

A. Yes, sir; that was in the case of vessels requisitioned by the Shipping Board, chartered—I mean the charter requisitioned by the Shipping Board lost while in possession of the Shipping Board and operating under its charter.

Q. And usually the charter provided that in case the vessel were lost the Government would pay just compensation?

A. Yes, sir.

Q. And for convenience it was referred to this particular board?

A. Yes, sir. They were known as the Ocean Advisory Committee.

Q. And they advised the Shipping Board, did they?

A. Yes, sir.

Q. And they allowed the owners to appear before them to give evidence?

A. I understand that their procedure was very similar to that of the Joint Merchant Vessel Board.

Q. Did you allow owners to appear before you?

A. Always fixed a hearing and, in many cases, several hearings.

Q. When it was not a practical question of whether it would be paid?

A. Oh, yes, sir. In every case the owner was notified of his right to appear, and advised that we would fix a time for hearing at his convenience, and he was asked to name a time convenient to him, or [fol. 654] asked to state whether or not the time stated in the communication would be convenient; if not, another time would be set.

Q. Well, if a ship like the Cushing was taken, just for example, a Standard Oil tanker, taken by requisition, and you in the course of human events reached the consideration of the Cushing's value, would you send to the Standard Oil Company, her owner, and ask them to appear?

A. We would notify the Standard Oil Company, the day that the communication came into the office directing an appraisal, we would

notify them that we had been directed to make this appraisal, give a tentative time and ask them if that was convenient, and, if not, for them to set a time that would be convenient for them to be heard.

Q. And were the owners in the habit of coming and presenting claims?

A. Always, except in the case of owners of small pleasure vessels who lived in the middle west, or something like that.

Q. Did they give any evidence?

A. Always presented evidence.

Q. You don't mean to say that the Southern Pacific Company presented any evidence as to the value of the Proteus, to you, did they?

A. The Proteus was never appraised by the Board of Appraisal for Merchant and Private Vessels. The appraisal which I speak of they did not participate in. It was in connection with the inspection of the Proteus made by the Joint Merchant Vessel Board.

[fol. 655] Q. Army and Navy?

A. Yes, sir.

Q. To see whether she was fit for an army and navy transport?

A. To see whether she would fit into either scheme, the navy or the army, in time of war.

Q. You don't know whether they put a value on her or not?

A. They refused to give any information as to——

Mr. McGrann: "They" meaning whom?

The Witness: I mean the owners gave no information of her value.

Q. Did the Joint Merchant Board fix a value of her?

A. We did. They refused to.

Q. At that time?

A. At that time.

Q. When?

A. On or about the 26th of May, 1916.

Q. It was that board, the Army and Navy Board, that fixed this value of $625,000?

A. That is the only Navy Board that has ever expressed an opinion as to the value of the Proteus, as far as I know.

Q. Now, that is the board of which you were a member and none of these other gentlemen were members of?

A. Exactly so, sir.

Q. That was strictly an Army and Navy Board?

A. Absolutely.

Q. What did the army man know about it?

A. I don't think he knew the question of value. I think that value of $625,000 was practically put in there by me. I think I consulted——

Q. Now, who else was there on the board that was fit to put a value on it?

[fol. 656] A. The other navy men who participated in the discussions are: a man who is now Captain Brinzer and the senior member of the board—he is now deceased—his name was Gill; the army man I think was a Major or Lieutenant Colonel Mitchell; I cannot be sure.

Q. You would not go so far as to say that in May, 1916, there was

any army men on that board that was entitled to have an opinion on the value of a steamer like the Proteus, isn't that so?

A. Yes.

Q. Now, what navy man besides you was fit to have an opinion on the subject?

A. Well, I am not going to comment on that.

Q. Well, was there any that had any experience?

A. I have stated——

Q. I am asking you a question.

The Commissioner: He is asking you to qualify or unqualify the other individuals.

Q. I don't want you to criticize them. It isn't at all to your discredit that they did not know anything about merchant vessels, but you have had a vast experience apparently in shipyards. Was there any other man besides you on that Joint Army and Navy Board that had had any equivalent experience?

A. No.

Q. And they practically left it to you?

A. That is the fact.

Q. And you put down a figure of $625,000 and reported it to whom, Secretary Baker?

A. Well, it went to the Secretary of War and the Secretary of the [fol. 657] Navy and to, I think, four of the bureaus of the Navy Department.

Q. And it went into the board files?

A. It went into the board files.

Q. And nothing happened?

A. Nothing happened; that's it.

Q. So what it comes down to is that you, Captain Gillmor, are the one person that valued the Proteus in May, 1916?

A. That is what I have stated.

Q. Now, did anybody ever value her after that in the navy service?

A. Not so far as I know.

Q. The Board of Appraisal for Merchant and Private Vessels did not?

A. Never passed on her.

Q. The Board presided over by Judge Cohen never passed on her?

A. That I cannot say; I don't know.

Q. What is the Board of Review?

A. The Board of Review would come in only in those cases in which a vessel, commandeered—title taken by the Navy Department—is no longer of use to the navy and is to be disposed of. In that event the Board of Review appraises.

Q. Fixing a set price?

A. Fixes a price at which the owner is permitted to repurchase if he chooses to exercise the option. Its other functions are all in the adjustment of claims for restoration, reconditioning of vessels had under charter by the navy during the war.

Q. Well, what did Daniel Bacon and Stevenson Taylor have to do with the valuation of the Proteus?

A. Nothing at all, as far as I know.

[fol. 658] Q. And then nobody, so far as you know, has passed on what is just compensation, officially?

A. No; as far as I know there has not.

Q. And Commander Taylor's contribution of a depreciation table was for the use of other vessels, I suppose?

A. It was used by the board in arriving at its values for all vessels that it appraised. I won't say that it was the determining thing, but it was one of the elements that had to be considered and was consulted.

Q. During the war, or since, have you sat on any board where the owners of ships appeared and fought for the valuation for their boats?

A. No, not since the war.

Q. Or during the war?

A. Oh, yes; during the war, right along from April, 1917 on.

Q. Did you pass on any values of vessels on any board that you were a member of where the vessels had been lost?

A. Well, not where they had been lost at the time the value was fixed.

Q. These values that your Board of Appraisal for Merchant and Private Vessels fixed were as a sort of protection to the Government in case they might be lost at some future time?

A. Not in the case of the Board of Appraisal for Merchant and Private Vessels. The transaction was to be closed at the time, except where a vessel was taken under charter; in that case we fixed the insurance value and the just compensation for the charter, and the insurance value was to be just compensation in the event of the loss of the vessel while in the possession of the United States.

[fol. 659] Q. You say it was to be, but you don't mean with the consent of the owner evidently; isn't that so?

A. Well, I don't know what you mean by consent of the owner.

Q. I mean by that statement this—that it was still open to the owner, in case his vessel was lost, to declare himself dissatisfied with the estimate that you had made and say he wanted more?

A. No, unless he had expected in his charter party. You see, after these values were passed, as to charter hire and as to insurance value, a contract was entered into between the Navy Department and the owner. If the owner did not choose to sign the contract presented he could incorporate in the instrument an exception as to the matter of value. He could take seventy-five per cent of the charter hire and sue for the balance, should he except from the insurance value, but in most cases the charter agreements were signed and in the charter agreements was incorporated the appraised value of the vessel, the value to be paid the owner in the event of loss before execution of it.

Q. Now, that was not so with any Shipping Board agreement?

A. No.

Q. No value was ever fixed?

A. The procedure was different. The Shipping Board charters provided for adjustment after the loss; the Navy Department charters incorporated in the charter the lost value.

Q. Now, I suppose you don't know what the arrangement was when the Railroad Administration took that up?

A. No, I had nothing to do with that.

[fol. 660] Q. Did the navy, so far as it was possible, try to compel the owner of a ship, requisitioned for naval purposes, to agree in advance to a valuation which should bind the owner in case of loss?

A. The Navy Department did what any prudent organization would do, and came to an agreement before, where possible, before the transaction was closed.

Q. You don't mean to intimate that the Shipping Board was not a prudent body, do you?

A. I am not here to comment upon the Shipping Board.

Q. You just said what any prudent person would do. Neither the Railroad Administration nor the Shipping Board attempted what the navy tried to do?

A. Well, now, I am very familiar with what the navy did, and I am not sufficiently familiar with what the Shipping Board and Railroad Administration did.

Q. Now, you, I suppose, have never been connected with any steamship company?

A. Never.

Q. And I suppose you would not undertake to say what percentage of depreciation they make, allow, as the years pass by?

A. I know what some of them allow.

Q. Some of them allow, write off, five per cent every year, don't they?

A. Some of them in the income tax returns write off ten.

Q. How do you know that?

A. Well, I may say that in the prosecution, at least, in assisting in the defense of some of these suits the income tax returns of the corporations have been turned over to us for the information they contained.

[fol. 661] Q. Even before there was an income tax, you know enough about the shipping business to know that a prudent owner, as you would very properly call him, would be solicitous to write off as much as he could every year, so as to have his boat stand on his books at as low a figure as possible isn't that so?

A. That is not exactly as I understand it. My understanding of the use to which depreciation charges or allowances are put is to keep fairly before the owner the fair value of his property, the liquidation value of his property; not deceive himself as to the value of the property that he has.

Q. What is the age of the merchant vessel Proteus, do you think?

A. The depreciation tables run up to forty years for merchant vessels.

Q. There was a gentleman here the other day from the Standard Oil Company, Mr. Morrell, who said that in ordinary circumstances, at the end of twenty years a vessel would worth ten per cent of her cost. Did you ever hear of any such principal as that?

A. The table which we used would give her a higher value at twenty years of age.

Q. Give her any value at thirty-nine years?

A. Yes, it would give her a value at thirty-nine years of a fraction, a little over, one per cent. I forget now what the figure is, a little over one per cent.

Q. Have you any knowledge of the amounts paid for merchant vessels lost during the war?

A. Well, the board, of which I was a member, interchanged information with the Ocean Advisory Committee.

[fol. 662] Q. That is Judge Cohen's committee?

A. Yes; that was finally known as the Ocean Advisory Committee.

Q. So the reports came to you and you read them?

A. No, I won't say that the reports came to us, but we were advised as to the values placed and in some instances both boards valued the same vessel, in some cases.

Q. I suppose they never differed?

A. Yes, they did; they differed.

Q. Both ways?

A. Well, I don't recall whether they differed both ways. In some cases there was no difference, but I know in some cases the Ocean Advisory Committee put a higher value on vessels than we had put. I remember that particularly in the case of the Narragansett and the Manhattan.

Q. It really has not been a part of your work, except while a member of these boards, to value vessels, has it?

A. That is true.

Q. You are really a naval constructor?

A. That is true.

Q. During the rest of your active work in the navy?

A. Yes.

Q. And until this necessity, this duty, was placed upon you of making appraisals and reporting to the Secretaries, you took comparatively little interest, no more than the ordinary naval officer would take, in the market value of merchant vessels?

A. Well, when you say ordinary naval officer, of course, that—I would qualify that by saying no more than most of the naval con-

[fol. 663] structors would take, but, of course, their business all relates to the construction end, construction and repair end of ships, and necessarily they would take more interest in values than would the seagoing officer.

Q. When you spoke in such ap-reciative terms of Mr. Stevenson Taylor's depreciation table, which you said represented, you thought, fairly over a period of years an actual value of a ship did you take into account the periods of terrible depression in the shipping world which lasted six or seven years, prior, we will say, in the early part of this century—1901 to 1906 and 1907?

A. My belief is that that table fairly represents the average of a number of years, above and below.

Q. Well, that is really a matter of faith rather than knowledge, isn't it?

A. Well, no, I think it goes beyond faith. It bases so much on the experience extending over a great many years that I don't think you could put that on faith.

Q. Now, you never in your experience knew of such an appreciation in values, increase in values, as occurred during the European War and for a year or so subsequent to it?

A. No, and any man, any owner of property acquired new during the war, who uses our depreciation table will deceive himself as to the value of that property today and five years from now. There is nothing as sure in business probability as the values based upon what it cost to produce those things as they were produced are above what they can possibly be from now on.

Q. From now on, yes, but, of course, after the armistice and when [fol. 664] the embargo on sales was lifted the price of merchant vessels was simply extraordinary and phenomenal, didn't you know that?

A. Not nearly as phenomenal as they were before the first of the acts restricting American vessels, except as to tankers, which are in a class by themselves, and of which there was the greatest scarcity at the time the armistice was signed. There wasn't any real appreciation in value after the armistice was signed.

Q. Do you recall passing on the value of the steamship Havana?

A. Yes, very well.

Q. And the Saratoga?

A. Yes, sir; very well.

Q. In the early part of 1917?

A. Not in the early part of 1917.

Q. When was it?

A. I think the Havana was passed upon in July, 1917, and the Saratoga in August or September.

Q. Well, now, you allowed for that boat, didn't you, $2,240,000, for each of those vessels?

A. That is true.

Q. One was built in 1906 and the other a few months afterwards?

A. As a matter of fact, they were both built in 1907.

Q. And the tonnage was about six thousand four hundred?

A. 6,400 gross; yes, sir.

Q. And registered about five thousand?

A. I have forgotten the net.

Q. And the passenger-carrying capacity is about three hundred. You allowed $350 a ton, practically, for her?

A. We did not allow on that basis.

Q. Well, that is what it came to?

A. That might be; I could not say.

[fol. 665] Q. Now, the owners appeared before you, didn't they?

A. They did, yes, sir; more than once.

Q. The navy took those boats and paid for them?

A. Yes, sir, took title to them and made hospital ships out of them. The owner was paid in full.

Q. Do you remember the original cost of the Havana?

A. The contract price of the Havana was about $950,000 and she

had a number of betterments made subsequent to her completion, which would bring her total cost up to about $1,183,000 or $1,184,000, somewheres around there.

Q. Well, she was a larger boat than the Proteus, and a better boat and a younger boat?

A. She had twice the horse power. She was half again as big and she had twice the horse power.

Q. Do you think that is a fall rate to make a deduction from as to value; can you compare the two boats?

A. I don't think you can very well, no.

Q. Well, but you allowed $2,240,000 for her?

A. That is entirely consistent with $650,000 for this one.

Q. You think so?

A. Yes, sir, absolutely.

Q. You thought that was too high, I suppose?

A. Well, I do not but I didn't then.

Q. The owners wanted three million for her, didn't they?

A. No, sir.

Q. How much?

A. They asked $2,500,000 for the Havana and $2,250,000 for the Saratoga.

[fol. 666] Q. What is the difference?

A. I don't know; I never did.

Q. And they gave you the Cramp's estimate of what it would cost to replace her?

A. Yes, sir.

Q. I was wrong in that statement of their wanting it. What I should have said was the Cramp's estimate said it would cost over three millions.

A. The Cramp's estimate, as I recall it—I refreshed my memory the other day. My recollection, after refreshing my memory, consulting the letters we had in our files, was that Cramp's estimate for the replacement was $2,750,000, and they said they could not reproduce her then under two years after the completion of the war.

Q. Did you have to value any of the Standard Oil boats that were paid for?

A. No. We valued some very early in the war that were under charter, but I don't recall which ones they were. They were a number of tankers owned by several owners, and the Standard Oil Company had two of the lot, but I don't remember which ones they were.

Q. Were any of the Standard Oil boats lost during the war?

A. So far as I know, none that the navy had for which the navy was responsible. There may have been some lost while in operation by the navy while under Shipping Board charters. That was the case one time; the navy was operating some tankers under Shipping Board charter.

Q. Well, no doubt you and your board meant to be very fair, but [fol. 667] there is no denying the fact that you had only one master and principal in the matter, and that was the Navy Department, isn't that so?

A. Our aim was to deal fairly, and I think I am justified in saying that we aimed to err—if we did err—on the side of liberality to the person whose property was taken.

Q. And that would be a distinct error if you were appointed by the Secretary of the Navy and owed your principal duty to the navy. I ask you whether you did owe your principal duty to the Secretary of the Navy Department?

A. I don't think we owed our duty to the Navy Department. I think we were sitting in a judicial capacity.

Q. Well, it was an ex-parte judicial capacity, I am afraid, was it not?

A. Ex-parte to what extent?

Q. Well, for instance, the Southern Pacific would not furnish you any evidence or appear before you?

A. You continue to confuse the Joint Board with the Board of Appraisal of Merchant and Private Vessels. The Southern Pacific had no occasion to be communicated with by the Board of Appraisal of Merchant and Private Vessels and at the time that the Joint Merchant Vessel Board asked them if they would give the terms upon which the Proteus could be taken over by them, they declined to do so.

Q. Your knowledge of the Proteus was—where did you see the Proteus?

A. She was lying at the Southern Pacific wharves, Pier 42, I guess it is, North River.

[fol. 668] Q. I suppose you concede that she was well kept up?

A. Yes, she was well maintained.

Q. For a merchant vessel?

A. Yes.

Redirect examination by Mr. McGrann:

Q. Have you taken into consideration the maintenance of the Proteus in making your valuation?

A. I have.

Q. Now, as to this Board of Appraisal; I understand that three members were naval officers and three members were civilians?

A. Yes.

Q. And those civilian members were affiliated more or less with merchant shipping in New York?

A. Well, two of them had been affiliated with merchant shipping from, oh, from the time they were twenty years old.

Mr. McGrann: I suppose counsel will concede that these men knew all the shipping men around New York?

Mr. Burlingham: I do not concede anything. I know them both. I know Taylor and Bacon. If you want me to make a statement I will do it. I have a very high opinion of them.

The Witness: Now, the third, Mr. Swazey, was more particularly identified with the yacht field, although he had had considerable experience in merchant ship building.

[fol. 669] Q. Now, counsel has asked you a question which seems to me is not quite clear as to the effect of depreciation on increased

values of vessels. If I am in error please correct me. Isn't it true that this table acts the same, whether the value is high or low; in other words, it is only a question of relativity; if a value is high, necessarily does it not depreciate in the same ratio as if a vessel's value were low?

A. The depreciation table represents the judgment, the average judgment, as to the fair value of a vessel of a given age in terms of her first cost, whatever that may be.

The Commissioner: Regardless of the amount of her first cost, the proportionate amount taken off of her depreciation is the same?

The Witness: Yes, sir, except, of course, that sometimes an owner who has bought a vessel or had a vessel built under exceptional conditions, will deceive himself if he thinks that the table is correctly going to express the value when that vessel is a few years old.

Th Commssioner: Yes, it will fool him if the standard with which he starts is not right, is not normal.

Mr. McGrann: That is just the point. In other words, it seems to me that if you take into consideration the increased values for this particular period, when you give a reconstructed value and de-[fol. 670] ducive value from that based on your depreciation table——

The Commissioner: No, because the thing is lost now. If it had not been lost then it was lost today, it would be very different. He says you might fool yourself in the future if you got your boat under exceptional circumstances, in an emergency, or at abnormal times. Then if you used this table to them and times will become normal again, you will find your value all wrong. What we are getting at is the value in August, 1918, when values were abnormal.

Mr. McGrann: Of course you will be deceived but your deception will not arise, I take it, by reason of the depreciation table per se but will arise by your false valuation at a prior date.

The Commissioner: The false standard with which you start; but if your vessel is lost on a particular day and you want to find out what it is worth on that day, you have got to have your standard of reproduction of what it will cost on that day, no matter how abnormal conditions are on that day. Then your depreciation table will be honest and apply, but the cost conditions won't change; it is not fictitious.

Mr. McGrann: If we take an increased valuation of two hundred and fifty per cent. over first cost of this vessel and apply a depre-[fol. 671] ciation table, that necessarily gives you the value at any time, because you take into consideration by that two hundred and fifty per cent. that increase of the valuation at that time.

The Commissioner: In other words, we are assuming that from the birth to the death of the vessel, times were the same.

Mr. McGrann: Yes.

The Commissioner: Well, we have got to do that. What else can we do?

Mr. McGrann: Certainly; and what I wanted to get from the witness was that in his calculation or (addressing the witness) in your calculation, you have, of course, started out with your figure rep-

resenting a value which is the increased value for that time, have you not?

The Commissioner: You started out with what it would cost to build it in 1918?

The Witness: Yes.

By the Commissioner:

Q. Then what you have told us about being deceived does not apply in this case, does it? If you take the amount it would cost to get her produced in August, 1918, then you apply your depreciation table to that—the vessel being lost in August, 1918—why, that will give you the approximate value, honestly, at the time, in August, won't it? There is nothing to be worried about, is there, in any [fol. 672] way, of the working of your table?

A. If the Proteus had been a standard type of vessel like a tramp, I think she would fairly have been worth in August, 1918, what it would cost to produce her, less her depreciation, plus her betterments, in accordance with the table, but she was not a standard vessel.

Q. You mean to say that for a steamer like the Proteus this depreciation table is not accurate, it is not a fair thing?

A. Well, I made an allowance, I explained in my testimony, that in arriving at $650,000—perhaps I had better explain what I did.

Q. Go ahead.

A. One of the angles based upon what it would cost to produce the Proteus, I mean, starting with that as one of the things to be considered, I computed the cost of producing the Proteus. I was advised that the Proteus in 1909 had had $90,000 expended on her in replacing the three double-ended Scotch boilers and, in addition, some structural work adjacent to these boilers. Now, that portion of the vessel was, the time she was lost, nine years old. The rest of the vessel——

Q. Did you take the cost of that, what it would have been in August, 1918?

A. No; here is what I did. I took the first cost of the vessel as $557,000; I took the reproduction cost of the vessel as of August, 1918, at two and one-half times that or, roughly, $1,400,000—a little bit less it comes out. Now, in that reproduced vessel there were nine-year old boilers and some adjacent betterments that cost [fol. 673] $90,000, and would have cost in August, 1918, $225,000. Now, I depreciated that element of the vessel for nine years.

Q. In accordance with the table?

A. In accordance with the table, and that would have made that part of the vessel worth, in August, 1918, $166,000. I subtracted the $225,000 from the cost of reproducing the vessel in 1918, and depreciated that for eighteen years, and added that depreciated value to the depreciated value of the boilers; that came out about $693,000. Now, considering the characteristics of the Proteus which differentiated her from the standard vessel——

Q. She was in a class by herself, was she?

A. My belief is that she was not worth the full $693,000, but that she was worth $650,000.

Q. To that extent you discounted the table?
A. I discounted the table $43,000.

Redirect examination by Mr. McGrann (continued):

Q. You were, I presume, more or less familiar with figures before you entered on your duties with these boards which you have testified to, were you not?

A. Well, I always took an interest in the cost of vessels of all kinds, naturally; that is my business—more of an interest in naval vessels than any other vessels, but always had an interest in the cost of vessels, always attempted to keep abreast with the times.

[fol. 674] Q. Do you object to stating the personnel of this Board of Review, Captain?

A. Captain R. L. Russell and Mr. A. L. Swazey, and Lieutenant Commander of the Supply Corps, whose name I always forget; it begins with B., a German name.

Q. Yourself for the fourth member?

A. Yes.

Q. Now, counsel has asked you about the appearance of owners of vessels at these appraisals before the Board of Appraisal. What was the object of having the owners appear?

A. Well, we wanted to get all the information that we could bearing in any way upon the just compensation.

Q. In other words, the board wished to have every bit of information that was available concerning those vessels?

A. Exactly. We particularly wanted to know what the vessels were earning for them and what betterments they had put upon them.

Q. Do I understand that the findings of this Ocean Advisory Board were final and accepted by the navy, I mean necessarily accepted by the Government?

A. I don't know enough about what happened to their findings to know really how binding they were.

Q. Captain, have you ever heard your board criticized by the Shipping Board?

Mr. Burlingham: That is objected to.

Q. As to the valuation you placed on these vessels?

Mr. Burlingham: That is objected to.
The Commissioner: I will sustain it.

[fol. 675] Recross-examination by Mr. Burlingham:

Q. Another reason for which you asked them to appear was that it was advisable to bind them, commit them to a value, if you could?

A. Well, of course, we wanted to have them state a figure of value.

Q. Now, what was there in the peculiar characteristics of the Proteus to make you cut down your valuation by seven and one-half per cent. or so.

The Commissioner: Forty-odd thousand dollars.

A. The Proteus is a more expensive vessel to operate for the carriage of freight than the standard type of vessel.

Q. She is a freight and passenger boat, isn't she?

A. Yes, but she is built for a special trade, and she is adapted to that trade, and if you wanted to sell her there would be a limited field for use for her, unless she were to operate under a handicap.

By the Commissioner:

Q. Then you are taking in the element of possible demand rather than an inherent value of cost?

A. You have got to, necessarily, at the same time, consider the uses to which she could be put to by a purchaser, in arriving at what her value is.

[fol. 676] Q. Well, so far as the depreciation is concerned, if the original cost, or the cost of reproduction, taken as a standard, is fair and right, why should not the table of depreciation be the same in the case of a special vessel, a vessel limited to one purpose as in the case of a vessel not limited?

A. This is for the owner of the vessel, and in this belief I was situated as the owner of the vessel.

Q. That is the kind of figure we are getting at. There would not be so many buyers for one branch of the service as for all branches, and that would effect the market, the market would be somewhat limited. It would not necessarily affect the value in the sense of the word in which we are using it here?

A. It would not affect what may be termed——

Q. But it would cost just as much in the first place? Suppose on the new boat there had not been any depreciation. It would have cost just as much, no matter what purpose it was used for. The fact that it can only be used for one purpose would not affect the cost. It might cost more than it would if it was for general use?

A. Well, of course, the cost takes into account the special use, because it is based on the first cost of the vessel.

Q. The cost has nothing to do with the market in this case?

A. I cannot pass on this case.

Q. I am fishing around, searching for a table of depreciation that I can use. I cannot allow them the full amount that it would cost to buy a new Proteus.

[fol. 677] Recross-examination by Mr. Burlingham:

Q. Is this table of Mr. Stevenson Taylor's a tramp table?

A. No, it is a table for steel, ocean-going vessels to which I have referred.

Q. Passenger and freight?

A. It applies to any steel ocean-going vessel, based on cost.

Q. Then why didn't you stand by it?

A. I was asked what my judgment was as to the value of the Proteus, and I arrived at the value of the Proteus in two ways.

The Commissioner: He discounted that because in his opinion the fact that it was used for a special purpose ought to operate to take something off. If that is not a good reason——

Q. She was engaged in trade between New York and the Gulf?
A. New York and New Orleans.
Q. She was perfectly fit for Transatlantic service, was she not?
A. She could perform the Transatlantic service at a disadvantage in comparison with vessels built for that service.
Q. If she had been free to engage in Transatlantic service during the war, she would have made five times what she did in the service she was in?
A. Undoubtedly, and the same can be said of all the vessels subject to the British Board of Charter and to all the vessels commandeered by the Shipping Board, and a great many other vessels.
[fol. 678] Q. Now, where is this famous Stevenson Taylor table; is it here?
A. I have a pencil copy of the table, down to twenty-five years, in my bag.
Q. Did you have no principle of depreciation until Mr. Stevenson Taylor produced his?
A. Mr. Stevenson Taylor produced this at the meeting at which we organized.
Q. And you all agreed to it?
A. After discussion we accepted it.
Q. Had you ever worked a table before?
A. Yes, sir, I had done something with a table.
Q. And where did you get yours?
A. Well, I didn't have a table but I had a method of depreciation which I made use of.
Q. Well, you seem to have an almost reverence to this. Is it of universal value and use? I never heard of it before.
A. Well, the reason you haven't is——

Mr. McGrann: Oh, yes; that has been testified to previously by Mr. Frank Martin.

The Witness: Of course, a man who has been in the business for a long time regards a lot of this stuff as his stock in trade, and I don't think Mr. Taylor would have ordinarily given me that. It was something that was worth something to him.

Q. Suppose you tell me what is the depreciation for the first year, according to the table?
A. It is a little bit over one per cent, a little bit over one per cent. for the first year.
[fol. 679] Q. The second year?
A. Still a little bit over one per cent. The rate of depreciation rises gradually up to a maximum and then falls gradually.
Q. Is the depreciation for the tenth year on the value of the ninth year or the first year?
A. No, the depreciation, as expressed in the table, is expressed in terms of the first cost.

Q. Did you ever hear of any other tables in use in England or any other country?

A. Oh, yes, yes.

Q. Every shipbuilder has one?

A. I don't think every shipbuilder has one.

Q. Every ship broker has one, has he not?

A. I don't know enough about the practice of ship brokers to know.

Q. You haven't introduced the element of purchase and sale, the market value, except in this matter of the peculiar characteristics of this boat which you think lessened her general market value. That is the only time that you let it play any part in your reasoning, isn't it?

A. No, in working forward from the value that I put upon her in May, 1916, I have taken account of the market.

Q. Oh, you added twenty-five thousand?

A. Well, if I had been called upon for a value of the Proteus in March, 1917, I would have put a higher value on her than I would have put after the legislation became effective which did affect the value of all American vessels subject to the terms of the legislation. [fol. 680] Q. If she had survived the war, outlived the war, have you enough knowledge of market values to say how much the Proteus would have been worth in the market in, say, in the summer of 1919—just yes or no?

A. Yes.

Q. What do you think it would have been?

A. In the summer of 1919?

Q. Yes?

A. I don't think the Proteus would have been worth as much as $650,000 in the summer of 1919.

Q. Now, you have enough familiarity with the market to say that?

A. Yes.

Q. Now, what boats do you know were sold in that time?

A. Of her type.

Q. Yes?

A. None.

Q. Of any boat of about the same size, steelbuilt vessel; twenty, nineteen years old?

A. Nineteen-year old, fifteen knot, passenger?

Q. Yes?

A. None in the United States.

Q. Great demand for them?

A. Not that type. There was a great demand for tankers. Everybody confuses tankers with——

Q. I don't confuse tankers; they are not the kind of boats that we are considering. I mean a merchant vessel, freight and passenger, or, if you cannot give freight and passenger, give freight that will carry as much as this boat—how much is she worth in the market, from any experience that you have of market values, in any port in

the United States, from the Gulf to this port, in the summer of 1919?

A. Tramps, in the summer of 1919?

Q. How much a ton?

A. How much a ton?

[fol. 681] Q. Yes.

A. Not to exceed $180 a ton.

Q. Did you follow the prices; do you know that?

A. Yes.

Mr. McGrann: I have asked to produce this agreement and Mr. Burlingham has just produced it. I offer it in evidence.

Mr. Burlingham: State what the agreement is.

Mr. McGrann: The agreement between the Director General of Railroads and the Southern Pacific Company and other corporations, dated February 19, 1919. I offer it in evidence.

The Commissioner: Is that offered in evidence?

Mr. McGrann: Yes. I offer it for the information of the Commissioner and the court, if you please.

(Marked "Petitioner's Exhibit 1-2/3-21-G. J. Z.").

Mr. McGrann: Counsel for the Southern Pacific Company produces a plan which is entitled "General arrangement plan S. S. Comus and Proteus, dated April 11, 1911.' I would like to have that marked for identification, with the further request that the object of my inquiry was to ascertain more definitely from the plan the general characteristics of this vessel, particularly an exact deadweight capacity, which is not shown on this plan, which has here-[fol. 682] tofore been testified to as varying from 3,700 to 4,000 tons.

(Marked Petitioner's Exhibit 2 for Identification—2/3-21—G. J. Z.").

Mar. 26, 1921.

ALBERT LORING SWASEY, called as a witness on behalf of the Standard Oil Company of New Jersey, being duly sworn, testified as follows:

Direct examination by Mr. McGrann:

Q. Mr. Swasey, what is your present occupation?

A. I am Vice President of Herreshoff Manufacturing Company at Bristol, Rhode Island.

Q. What is your profession?

A. Naval Architect.

Q. How long have you been practicing that profession?

A. Since 1898.

Q. Will you state the experience you have had in the practice of your profession recently, please?

A. I took a special course at the Institute of Technology in Massachusetts, in naval architecture, for four years. I went to the New-

port News Shipbuilding Company in 1898, and was there five or six months when I got a position at Cramp's ship yard, and went there for a year, when I went over to the New York Shipbuilding Com- [fol. 683] pany that was just starting in Camden, New Jersey. He tried to get all the technology men that he could, Mr. Morse, who was President of the yard—Henry Morse. I was there four years. From there I decided to start my own business, which was a small yacht yard.

From that I got into the design business, the design of yachts, and I was in that business for myself until a year before the war, when I was approached by the Herreshoff Company to go in with them, which offer I accepted, and about a month after I accepted that I was called to Washington by the United States Government to do something to stop the submarine menace which they thought was very bad at the time, and they figured we were liable to get into trouble—about two months before the war.

So I went to Washington in February, as I remember, and worked there on the design of a submarine chaser, and finally designed the 110-foot submarine chasers, of which we built 456. I was there until the war broke out and was asked by Mr. Roosevelt if I would serve on an appraisal board. A list of boats came in one night and he did not know much about the value of them, so he decided they ought to have an appraisal board. In the meantime the Navy Department had considered me for superintending constructor of the United States Navy, headquarters at New York, and I told Mr. Roosevelt that would be my paramount duty. He said I would also [fol. 684] take up the appraisal board work, that that would be worked out that way. So I joined the appraisal board and was given the rank of Lieutenant Commander of the Naval Reserve Force of the line.

Our board met for the first time on April 2, 1917, here in New York. Later I was changed to the construction corps and became Lieutenant Commander of the construction corps with provisional rank in the United States Naval Reserve Force. I have been on the appraisal board ever since. The President, I think in June of that year, appointed a board for just compensation, of which he made me a member, and at the end of the war they appointed a board of review of which I was made a member, and the appraisal board work has gradually worked into the board of review.

At the outbreak of the war, or one month after the outbreak, on account of my company having a lot of government work to complete, I had to resign my position in the Herreshoff Company—at least I did resign, I thought it better to resign. After the war I went back to the company. I was interested in the Palmer fleet of schooners in 1906, 1907, 1908 and 1909, which at that time was the largest fleet on the coast. I might call myself assistant to Mr. Palmer. He was my old school teacher and built this big fleet up, so I helped him.

Q. During your various experiences, as you have outlined them in your answer to the last question, have you had occasion to know and did you know values of construction, ship construction?

A. To a certain extent, yes.

[fol. 685] Q. In your experience on the board of Appraisal, did you have occasion to study values, and did you study values of ship construction, and in fact then present values?

A. Yes, sir.

Q. How many vessels, merchant vessels would you say roughly you assisted in appraising during your experience in the board of appraisal and the board of review?

A. I don't remember. An awful lot of them; I cannot say.

The Commissioner: An awful lot of them, that is enough.

Q. It runs into the thousands?

A. No, there were not thousands, hundreds.

Q. Are you familiar with the "Proteus" formerly owned by the Southern Pacific Company, which was later requisitioned and was lost by sinking in 1918, on August 18, 1918?

A. Yes, sir.

Q. Did you see that vessel during her lifetime?

A. I saw it at Newport News.

Q. Was she there during your period——

A. She was there when I was there.

Q. What was being done to her, Mr. Swasey?

A. She was being built, just started. She was started in 1898, by the way, or 1899.

Q. Are you familiar with her general dimensions?

A. Yes, sir.

Q. Her tonnage and horse power, etc.?

A. Yes, sir, I am not quite sure about the horse power.

Q. Do you know the size of her cylinders?

A. Yes, sir.

[fol. 686] Mr. McGrann: I will state that she was entered in Lloyds at 158 nominal horse power. I do not know whether there is any evidence of the exact horse power.

The Commissioner: You can ask him to assume that in your question.

Q. You have seen at what her horse power is registered in Lloyds, have you not?

A. Yes. I think it is different from that figure you gave.

Q. Have you at my request made an appraisal of the "Proteus" as of August 18, 1918?

A. Yes, sir.

Q. What figure have you stated as the value at that time of the "Proteus"?

A. $611,000.

Q. Will you state how you arrived at that figure, Mr. Swasey?

A. Well, I took the cost of the ship, which I did not know until I looked it up. The cost, as you all know, was $557,000 approximately in 1900. The boiler and some of the hull changes around the boilers in 1910 were changed for $90,000. Now, then, I figured

the cost of the vessel in 1918 similar to Captain Gillmor's testimony, which I read very carefully. It seemed to me his figure was about right, $1,400,000. The same way with the boilers, and the extra hull work, would amount to $225,000, which subtracted from that left me $1,175,000, which is without the boilers.

I then referred to a table I had, the same table that Captain Gillmor referred to, and depreciated the price of her hull for eighteen years, which brought it down to $521,000, and depreciated the price [fol. 687] of the boiler—this is where I differed from Captain Gillmor—I depreciated the price of the boiler and hull work around there forty per cent, or $90,000. I added the $90,000 and $521,000, which gave me $611,000 as my appraised value, first appraised value of the boat. There really should be on an exact appraisal of that boat another deduction, I think, on account of her build.

Q. State what you have in mind about her build as the foundation of another deduction?

A. (Witness draws pencil sketch.) This "Proteus" is an awning decked ship and this deck on the "Proteus" was a steel deck all the way across, and two other decks. This deck, the upper deck, was a steel frame deck, this topmost upper hull, but with a wooden deck on her deck beam. Her strength, therefore, her freeboard, was very low, up to her solid deck.

This is of value in one way and interesting in another. This boat had a system of hatches which for her business was very good, because they could unload very easily. The whole top business came off and her hatch came out at the side.

Mr. Burlingham: Meaning as a port.

The Witness: The whole thing came out; and if you take it out you have a condition like that (illustrating on sketch).

Q. Referring to the sketch on the upper part of the paper?

A. The whole thing came out. Now, considering the value of this [fol. 688] boat as competing with the other values of tramp steamers, this boat's strength really stopped at that deck (indicating). Up here, which is at the highest point of leverage of a boat and which I have had occasion to study carefully on some of my bigger boats, we found weakness the boats would develop unless you kept your decks solid. Because the biggest point of leverage in crossing an ocean would be at this point here (indicating), and we had a point of weakness for ocean-going travel in this boat. Also these ports here were also below the water; most ocean traders' would be. The main point is this, she had a big port there, a big port there, three little ports there, a port there (indicating). It is a question how Lloyds would figure that in ocean trade. I am not prepared to say, but I think——

The Commissioner: You might say in view of the existence of these things in the boat what the effect might be.

Mr. Burlingham: Those are great big ports. He has made a picture of it here.

The Commissioner: I get the point.

The Witness: Now, from the other point of view, of a further deduction, this boat is what we call a bar keel ship. You all know what the bar keel ship is.

Mr. Burlingham: No.

The Witness: I will show you. Do you mind if I draw?

The Commissioner: No.

[fol. 689] The Witness (referring to sketch): The modern steamship is built with a flat plate keel like this. They make a strong girder with this plate here, a double bottom going across here (indicating). All tramps are built like that to carry the water ballast. Now, this boat, which by the way was a very well built boat, had what they call a bar keel, which came down a little more slantwise, like that (illustrating) and both plates turned on a piece of iron like that (illustrating). She had no double bottom at all, and these floors came across. The result is that if I wanted to buy a tramp or a ship to go across the ocean I would take a ship like this, that had a double bottom in it, rather than a ship with a bar keel, because this boat can carry its ballast in here (indicating) and can carry no ballast there (indicating).

By the Commissioner:

Q. The result is that this boat, having this kind of keel, had some desirability as an ocean-going ship?

A. No, it is against it. The modern tramp steamer with the double bottom is much more valuable as an ocean going ship.

Q. Then the fact that this has not got a certain other kind of keel renders it less desirable?

A. Exactly.

[fol. 690] Mr. Burlingham: This is the old fashioned kind.

The Witness: That is the old fashioned kind. Here is the point: If you have a double bottom you can keep your ballast down here (indicating). It has had to have two big ballast tanks here, and she carries coal athwartships forward and athwartships here (indicating), and it takes up a third of that ship, of the lower hold.

Q. What effect does that have?

A. It cuts down your cargo space.

Q. What effect does it have on its value?

A. Any boat that cuts down cargo space is not as available as a boat that has more cargo space.

Q. I understand that, but I mean in dollars and cents, have you that there?

A. No, I have not that. All I wanted to put down was that was my idea for saying there should be a further deduction on this ship, over another ship.

Q. But you are not telling us how much of a deduction?

A. No; I said at the start I was not prepared to say.

Q. If you had another boat exactly like the "Proteus," with the exception of the fact that the other boat had these things that you have referred to on this piece of paper, you do not know how much

more you would pay for that other boat over the "Proteus"; you say you would rather have it?

A. No, I think I would pay for the other boat what I have put [fol. 691] down here. This is my appraised value for a boat of that size.

Q. Assuming it is different from what it is, I mean?

A. For a boat of that size I would pay $611,000 for.

Q. Provided it had another kind of keel?

A. Yes.

Q. And what other provisions do you make?

A. Provided it was of standard tramp construction.

Q. Will you specify what the "Proteus" would have to have that it has not got or did not have in order to make it worth the appraised value fixed?

A. Yes.

Q. You have already done so, but I mean sum it up?

A. If the Proteus had a double bottom, flat plate keel, so she could carry a ballast in her double bottom, and if she was a foreawning deck ship without the ports in her sides, and if her lines were a little bit different, I think she would amount to $611,000.

By Mr. McGrann:

Q. In order to use this very excellent sketch that you have drawn, Mr. Swasey, the small figure on the upper right hand corner which I take the liberty of marking with a capital "A", represents a section of the ordinary cargo carrying vessel?

A. Well, very rough sketch.

Q. With a flat keel and the double bottom compartments?

A. Yes.

[fol. 692] The Commissioner: Are you going to try and find out how much difference it makes?

Mr. McGrann: Yes.

The Commissioner: He says he does not know.

Mr. McGrann: He has not said that.

The Commissioner: That is his general idea.

The Witness: I said I was not prepared to say.

Q. The sketch which I have marked "B" adjoining the sketch "A" is a section showing the construction of the "Proteus" as she was?

A. Yes.

Q. Without the double bottom and with the bar keel?

A. Yes.

Q. Would it be possible to put the "Proteus" in the position you assume it to be in, for the purpose of fixing a value, and if so, how much would it cost? The first question is, could the "Proteus" be put in the position of the boat that you assumed in making your estimate of value, $611,000?

A. I don't think so; not entirely.

The Commissioner: In order that your estimate might be of value to me in deciding the case, I would have to determine what the value was that you claim the "Proteus" did not have.

[fol. 693] Q. A double bottom could be constructed in it, could it not?

A. It could, but it would be foolhardy to try such a thing. It would be possible. I can go on further and say that the lines are not right for a double bottom boat, they are too sharp.

Q. To continue with this sketch, this sketch in the upper left-hand corner represents the hatch, the two hatches?

A. Yes.

Q. I will mark that "C", The deck being the top deck to which you refer in the sketch is "D-E", is that right—this deck along here (indicating)?

A. Exactly, that is a deck with steel beams.

Q. The next is the first continuous deck below that?

A. Yes the first continuous deck, and that is all steel.

Q. That I marked "F-G".

The Commissioner: Is that going to help me?

Mr. McGrann: Yes. He has referred to certain supposititious things, and I want to get what he testified to.

The Witness: All I can say is—I said that it would affect my value, but I was not prepared to say how much. But I do not think the boat would be worth as much as the standard tramp.

Mr. Burlingham: The other witnesses have said it is about $650,000. There is no use bothering about it.

[fol. 694] The Commissioner: I suppose that is so, but we cannot be too mathematical about it.

Mr. McGrann: We want to get it with all possible accuracy.

Q. What would you say about the "Proteus", as to her build and seaworthiness for trans-atlantic voyages, as she was constructed?

A. Well, she could go across all right. Some of the boats of that type have been across. As I remember it they were built across where that open hatch was first. You could cross the ocean all right.

Q. That is, you say those vessels that cross were built up?

A. I am not sure about that, but anyway the boat is perfectly capable of going across the ocean.

Q. What effect would this construction have on her dead weight capacity, her cargo-carrying capacity, I mean?

A. She has a very small dead weight carrying capacity, compared with others.

Q. Would that furnish any foundation for an estimate on your part, as to how much reduction in value there would be, brought about by the difference in the construction of the "Proteus" and the ordinary freighter of that size that general size?

A. It would affect me just as much as this has, that there ought to be a further reduction, as I say, from that appraised value.

The Commissioner: Would it be $50,000 or can you give us an [fol. 695] outside figure? Or do you mean you would rather have the other kind of boat, or as a matter of fact the other kind of boat would be really more serviceable.

The Witness: The other kind of boat would be really more serviceable.

Q. How much would a boat of that gross tonnage, say if constructed as you have indicated the ordinary vessel is constructed for cargo carrying, carry in cargo in excess of what the "Proteus" carried, which it has been said on the record, I think, was about 3,800 tons dead weight tonnage? I think one witness said between 3,800 and 4,000?

A. She ought to carry approximately 7,000 tons dead weight.

The Commissioner: How much?

The Witness: 7,000 tons dead weight, if she was a regular tramp steamer.

Q. Then, as I understand it, Mr. Swasey, your figure of $611,000 is the maximum that you could give as representing the value at the time of the "Proteus"?

A. Yes, $611,000 is the maximum figure as representing the value, the appraised value.

By the Commissioner:

Q. When you say appraised value, do you mean the amount that a person ought to be willing to pay for it who really wanted it?

[fol. 696] A. No, I mean the appraised value of the boat, what I would appraise her for.

Q. You would appraise her at the same figure for all purposes, or if you were appraising her for a corporation that wanted to take her and sell stock in her, that would be one thing; if you were appraising her for a receiver in bankruptcy that would be one thing.

A. No, this is the appraisal value of the boat, at what I think she is worth, $611,000 at the maximum. I will put it that way, the appraised value of the boat.

Q. The appraised value of the boat would be the value that an owner ought to be able to get for it if he wanted to sell it; is that so? Is appraised value different from market value?

A. Very much different, yes. Yes, it is very much different.

By Mr. McGrann:

Q. Mr. Swasey, there has been some testimony here about the steamers "Havana" and "Saratoga" having been appraised by the board of appraisal. Are you familiar with those steamers?

A. Well, I remember we figured on them on my board of appraisal. We appraised them while I was on the board.

Q. Was the method that you used in appraising those two vessels similar to the method you have now used for the "Proteus"?

A. Well, we appraised all the boats in a similar way. Of course,

various factors would come up in the appraisal of boats which would [fol. 697] make one change one's ideas from one boat to another, but the general practice was continued the same on all boats appraised by the board.

Q. I understand you used the so-called Stevenson-Taylor table of depreciation, did you?

A. Yes, sir. I happened to have it, and here it is (producing same).

Q. We can put on the record what the depreciation was in 1918, can we not? I mean eighteen years?

A. Yes, sir. .47, I think it is. It is .452, to be exact.

Q. I ask you if this appraisal that you made of the "Proteus" is reconcilable with the appraisal that you assisted in making of the "Havana" and "Saratoga"?

A. Well, I know at the time we figured that we had worked our price out consistent with our rule, similar to the way you have worked this ship out.

Q. The way you have worked this ship out?

A. Yes.

Q. And the results are arrived at on the same lines?

A. On the same lines; yes, sir.

The Commissioner: The result here is the result of applying the same principles?

The Witness: The same principles. I will say this about that beautiful sketch, that a great many times the sketches—not my sketches particularly, but some of the others—a great many times it had a big bearing on the appraisal of the board.

Mr. McGrann: I will offer that sketch as an exhibit.

[fol. 698] Marked Petitioner's Exhibit 3, 3/26, 21, J. A. F.

Cross-examination by Mr. Burlingham:

Q. As a member of these three boards, what was your purpose in appraising; what were you appraising for?

A. We were appraising the boats, merchant and private vessels, that were taken over by the government for the war, simply in an advisory capacity for the Secretary of the Navy, on the appraisal board.

The Commissioner: So that the Secretary of the Navy would know what?

The Witness: So he would have a general idea what the value ought to be.

Q. You mean so that he would have a check?

A. He would have a check.

Q. So that if the navy took over under requisition a boat and the navy had to pay for it, he would have a guide in this preliminary appraisal of yours; is that it?

A. Yes, sir.

The Commissioner: He would know he ought not to pay more than the figure that you fixed?

The Witness: That was the idea.

Q. If the navy had nothing to do with the boat, but we will say it was the Shipping Board had the boat, or the army, what was your appraisal to be used for, if for anything?

A. I never knew anything about the Shipping Board.

[fol. 699] Q. Did you have anything to do with the army?

A. No, only where an army tug ran down a——

Q. It was just a wise precaution, an act of providence on the part of the Secretary of the Navy?

A. The Assistant Secretary of the Navy; yes, sir.

Q. The Assistant Secretary of the Navy, Mr. Roosevelt, to be ready?

A. Yes, sir.

Q. In case of claims arising?

A. Yes.

The Commissioner: Were you instructed to place a low limit and a high limit, or what?

The Witness: We were instructed to use our own ideas. When I say our own, I mean the ideas we all came to as to what was fair to all concerned.

Q. The owners, of course, were not represented at these sessions of yours, were they?

A. They were called upon to testify if they cared to as to the value of their boat.

Q. Sometimes they did and sometimes they did not?

A. Sometimes they did and sometimes they did not, because they did not bother at all; but generally they did, they came up and were fully heard.

Q. Did you value the "Proteus" at this time in any of these boards?

A. Not that I remember.

Q. Why not?

A. I do not think she came before the Board.

[fol. 700] Q. Well, on what system did the vessels come before the Board?

A. The government sent in a list of vessels, a pile of ships coming in like that (indicating).

Q. Do not say the government, say who did it. What branch of the government sent them in, the Secretary of the Navy?

A. The Navy Department. The Navy Department would send in these lists of boats to be appraised.

Q. Here sat the Board of six men?

A. Yes, sir.

Q. And you received the names of certain boats?

A. Yes, sir.

Q. You were asked to report on them?

A. Yes, sir.

Q. And did so. And as it happened the "Proteus" was not one of them?

A. Not that I remember.

Q. Were any of the Southern Pacific boats valued by them?

A. I do not remember.

Q. Can you give any reason for omitting them from your consideration?

A. I cannot give any reason, but I know a number of boats have, particularly lately, never appeared before us. They were appraised somewhere else. Why they were—I think the Secretary of the Navy had a right to put a value on them if he wanted to.

Q. Are you still sitting, and for whose account?

A. I am not sitting for anybody any more. I got through yesterday.

Q. Up to yesterday for whose account were you working, the government's?

[fol. 701] A. Yes, the government, but I was the only non-active member on the Board.

Q. Are numbers of merchant vessels being sent in now?

A. No, not so many now. Once in a long while. Well, we have not had many for a long while. We are pestered with coal barges now that have been crushed, and yachts.

Q. Of late you have been considering values more with reference to claims, haven't you?

A. Yes.

Q. And with regard to nothing else now?

A. Well, we have one or two boats that are dragging along. We had four yesterday—not for claims, but you put a price on at which they could be sold.

Q. Suppose the Ward Line or Southern Pacific had built a new boat in the last few years, would there be any occasion for your board to consider her value now?

A. Not that I know of.

Q. In fixing these values you were not considering market value, were you?

A. No, sir; not this value that I have fixed here, you mean.

Q. In appraising value of boats from the time you were appointed —in 1917, was it?

A. April 2nd, 1917.

Q. You were not considering market values as such?

A. We were considering what the market value we thought ought to be.

Q. Ought to be?

A. The appraised value.

Q. You have been engaged with these various important companies for a long time. Since 1898, is it not?

A. 1898, yes.

[fol. 702] Q. Up to 1917 it has never been any part of your work to ascertain and keep yourself acquainted with the market for ships as to how much they were bringing in the open market?

A. Yes, I tried to start—I tried to buy some steamships for people, I had to design steamships for people, so that I had to get a general idea.

Q. When?

A. In 1916 or 1917, and as far back as 1912.

Q. Not very——

A. Not to a tremendous extent.

Q. I assume you had in connection with these companies, something to do with the estimating of the cost of the ship. I do not know whether you were in that department or in the construction department?

A. No, I was not in the estimating department, sir.

Q. You were in the actual constructing department, were you?

A. Yes, sir, I was a draftsman.

Q. Designing?

A. I was a draftsman in the hull department.

Q. You did not bother with how much a vessel was going to cost her owner, but your job was to see that whatever work was to be done was well done?

A. Except when I left the shipyards and went in for myself, after I grew older, some of the men I built large yachts for decided they wanted to start steamship lines. They never did, but they decided they would, and I had to design some with a view to getting an idea [fol. 703] what we could get them for on the market, the cheapest steamships and also what we could build them for, and all that sort of thing.

Q. Mr. Swasey, you see there have been a great many thousands of ships bought and sold in the last twenty years?

A. Yes, sir.

Q. Before the war, and there have been men during that period who made it their business to acquaint themselves with the prices of all types and of classes of vessels the world over. Now, that was not any part of your job, was it?

A. Well, I would not say it was any part. I tried to look all over the place, but it was small; I would say a small amount.

Q. While you were no doubt a very valuable technical man on these boards, you would not go so far as to say that you were a real expert on the market value of ships when you went on this board April 2, 1917, would you?

A. I would say that I was primarily chosen as expert on yachts and motor boats.

Q. Were you an expert on the market value of yachts at that time, or the cost of building them or the method of constructing them?

A. No, cost of building them and method of construction.

Q. Do you know how much it would cost to build a ship like the "Proteus" in 1918?

A. I think it would cost two and a half times its value in 1900, as I stated.

Q. You mean it cost in 1900?

A. It cost in 1900; yes, sir.

Q. Is that an arbitrary figure, or is it based on what the shipyards [fol. 704] were estimating the cost of ships?

A. It is based on what I think shipyards ought to be able to build boats for at that time.

Q. I am very skeptical, Mr. Swasey, about these percentages that people reel off so readily. I should think you might be able to tell me what the Newport News Shipbuilding or Cramp's, or the New York Shipbuilding would build a boat for in 1918, if you are familiar with those things, if not, I won't press it.

A. Well, I think that they probably—I think they could have built the boat for two and a half times. I think they probably would have given us a much higher figure. I know our yard, which was not merchant work, they gave a much higher figure than they could get it out for, because they were so afraid of labor conditions.

Q. Yes, and material was rising, too?

A. Yes, material was rising. In 1917.

Q. In your work on the board, did you take this table, this Stevenson-Taylor table, as gospel guide?

A. No, it was really a tremendous help, and it was a large factor in arriving at these figures, but not the entire factor.

Q. You have contrasted the Proteus with the up-to-date cargo-carrying tramp, have you not?

A. Yes, sir.

Q. To the disadvantage, rather, of the "Proteus"?

A. For ocean-going trade.

Q. Of course you appreciate that the Proteus was a passenger vessel, do you not?

A. Yes, sir.

[fol. 705] Q. Do you give that no weight at all?

A. Yes, sir, I think that she was a very good passenger boat for the service she was in, a well built boat.

Q. For eighteen years she was steadily in the freight and passenger trade for which she was built. I do not know why you do contrast her with a cargo tramp, which is an entirely different type of vessel, I should say?

A. On account of the fact that I think the market value of the ship would be somewhat dependent on the general market or what ships were in the market. I can conceive of the boat being an extremely good boat for the work she was in, but if that work went up and there was anything like that, and there was no place to use her, why——

By the Commissioner:

Q. Your appraisal was not the market value appraisal, you say?

A. No.

Q. It is the estimate of value, regardless of whether there was any market on it or not?

A. Yes.

Mr. McGrann: I really think these questions are irrelevant so far as the market is concerned. We have not any market.

By Mr. Burlingham:

Q. The Southern Pacific Company is doing business at the old stand still, is it not, carrying freight and passengers between here [fol. 706] and New Orleans?

A. As far as I know.

Q. When the lid was taken off on the requisitions, and the requisitioning ceased, are you not aware that the price of vessels was very high—the market, for some time, some months?

A. What was that first part of the question?

Q. When the requisitioning ceased?

A. Yes, I think the prices were quite high.

Q. You think it is a fair method of getting at the value of a vessel during the war to ascertain how much it would cost fairly to build a vessel like the one in question, and then depreciate it according to an established method, do you? A. Yes, sir; I think so.

Q. Do you happen to know the speed of the "Proteus"?

A. All I know is what I have heard.

Q. What?

A. Fifteen knots, I think she is down for.

Q. How many?

A. Fifteen knots.

Q. And these cargo steamers you have been talking about, I suppose are ten-knot boats, are they?

A. A boat of that size would make eleven to twelve knots. Not as fast as the "Proteus".

Q. Are you not making that a little high for the American built cargo vessel?

A. No, I think you might get a tramp steamer that would make twelve knots with oil fuel.

Q. These that have been turned out at the Submarine Boat Company, for instance, they are not twelve knots?

A. They are lucky to run, some of them. I think some of them [fol. 707] made ten knots, but eleven knots—most any of them make eleven knots. But twelve is the highest.

Additional Proofs for Claimant

March 31, 1921.

FREDERICK P. PALEN, called as a witness on behalf of the Southern Pacific Company, being duly sworn, testified as follows:

Direct examination by Mr. Burlingham:

Q. Mr. Palen, you are now the Vice-President of the Newport News Shipbuilding & Dry Dock Company, are you not?

A. Yes, sir.

Q. And have been for how long?

A. I have been Vice President since 1915.

Q. And as of course we all know, the company's yard is in Newport News, but you are stationed here in New York?

A. Yes, my office is in New York.

Q. And what is your particular part of the business?

A. I handle generally the question of dealing with prospective [fol.708] clients submitting prices for contracts, and also attend generally to the financing of the business.

Q. Will you give us your experience? You graduated from Cornell, did you not?

A. I graduated from Cornell University.

Q. As mechanical engineer?

A. With the degree of mechanical engineer, in 1894, and I entered the employ of the shipbuilding company right after graduation as a draftsman, and I was appointed chief draftsman in the engineering department in 1899, and assistant chief engineer in 1906, and assistant general manager of the works in 1912 and Vice President in 1915.

The Commissioner: Which you still are?

The Witness: Which I still am, yes.

Q. This is one of the large shipbuilding plants of the country, I suppose?

A. Yes, one of the largest in the United States.

Q. And you built the "Proteus", did you not?

A. We built the steamship "Proteus".

Q. I think she was launched in 1900, wasn't she?

A. Yes, she was delivered June 6, 1900.

Q. And it took about fifteen months to build her?

A. About that time. I don't recall just exactly.

Q. You were at Newport News at that time, were you not?

A. Yes, I was at Newport News at that time.

Q. You had to do with the construction?

A. I had charge of the machinery designing of the vessel.

[fol. 709] Q. Had you built a great many ships and steamers for the coastwise service?

A. We have built of this particular class, fourteen.

Q. How would you describe this class generally?

A. They are known as the 400-foot class of the Southern Pacific ships. They were originally built for the Morgan Line and for the Cromwell Line, but these lines were afterwards consolidated under the Southern Pacific Company.

Q. This "Proteus" had a sister ship, the "Comus"?

A. Yes, they were built at the same time.

Q. And they are freight and passenger boats?

A. Yes.

Q. I won't give you the details because you are perefectly familiar with them, are you not?

A. Yes.

Q. The tonnage?

A. Yes.

Q. And the dimensions, etc.?

A. Yes.

Q. I asked you the other day, did I not, to work out what it would have cost to reproduce the "Proteus" in 1918?

A. She was sunk August 18, 1918?

A. Yes.

Q. And if she was to be reproduced I asked you to tell how much it cost to reproduce her, how much it would cost the Southern Pacific Company?

A. That is correct, you asked me to make an estimate for a price of this vessel as of August, 1918.

Q. Were you a' le to do that?

A. I have done so, yes.

Q. What would have been the cost of reproducing?

A. My figure shows that the price of the vessel at that time would [fol. 710] have been $1,755,450. I give that as a total in that way the figures work out in that sum.

Q. One of the witnesses here the other day said that in his opinion a fair way of getting at the cost of reproduction in August, 1918, would be to multiply the cost of a ship by 2½, the cost of a ship of this age being eighteen years, by 2½. What do you say as to the fairness of that?

A. That is quite unreliable and that is not the way any shipbuilding people who have to determine the price they put in for a ship, arrive at the cost of a ship. If the factor of 2½ differs the slightest bit from the actual factor it should be you get a very great error in your price. I can describe if you want how we make an estimate.

Q. No, I won't go into that. I am satisfied without it. Mr. McGrann may ask you that. One of the witnesses also stated that he seemed to have in mind a comparison rather unfavorable to the "Proteus" with a cargo steamer without a bar keel and with a double bottom. Do you think a tramp steamer or cargo steamer is properly comparable to a steamer of this type?

A. I don't know exactly what the comparison was, but I do know that we have built this type of ship for a great many years for the coastwise service, and it is at present a very satisfactory type, and we have continued to reproduce this design for at least thirty years.

Q. What do you say is the life of a steamer of this type if kept up well?

[fol. 711] A. Well, I think that that probably can be as well illustrated as in any other way by the fact that we started building this particular type of steamer for his service, and the first ones we delivered in 1892,—that is twenty-nine years ago, and those vessels, two of them, are still in service with the Navy Department as supply ships and as far as I know they were using them right straight along and in excellent condition. I think probably if you will look at one of those ships you would say it was good for another thirty years. But apparently thirty years of service of this particular type of ship would put the ship in a condition where it is still quite available and suitable for the trade for which it was built.

Q. There must have been, Mr. Palen, a great many changes and improvements in the construction of ships during the last twenty years, is that correct? And if so, does that apply to coastwise ships as well as transatlantic service?

A. I would say there has been an improvement possibly in the accommodations and in the machinery, but I think the general steel structure of a ship, the main structure, is not materially changed.

The Commissioner: The improvements would not extend the life of the ship?

The Witness: Not particularly, no. I say the life of a ship depends upon the quality of your steel structure.

Mr. McGrann: You mean improvements in design?

Mr. Burlingham: Yes, in design.

[fol. 712] Q. In calculating the cost of reproducing the "Proteus" did you vary from design or plan in your mind?

A. No, I estimated on reproducing the ship as it was originally designed.

Q. As originally designed?

A. Yes.

Q. What was her speed?

A. Fifteen knots. That was her designed speed. I think they run the ships a little more than that.

Q. Will you define to me the term obsolescence? What does that mean in regard to ships?

A. Obsolescence I would take it means that it comes from the character of the trade that the ship is engaged in, the change in the character of the trade. For instance, you take a passenger ship, a high grade passenger ship in the transatlantic service, and it will become obsolete very much quicker than a ship engaged in a regular trade where the same type of ship is suitable. I think the passenger ships probably become obsolete very much quicker than these freight ships.

The Commissioner: Because they are made and used all the time for the freight or passengers?

The Witness: That is it exactly.

Q. What about the service like this between New York and New Orleans? Have many changes taken place in the service?

Mr. McGrann: Does this witness know?

Mr. Burlingham: He built them all.

[fol. 713] Q. How many boats had you built for the Southern Pacific?

Mr. McGrann: To run between here and New Orleans?

Q. How many boats have you built for them?

A. We have built, I think, at least eighteen. I think if you count small boats we have built twenty.

Q. Do you know the nature of the service between here and New Orleans?

A. I am familiar with it simply as a matter of information in connection with the designs.

Q. Have there been any material changes in the designs?

A. I think that in the passenger service they put on a large type of boat some years after the "Proteus" and "Comus" were originally put on, but I believe that for the size of the boats, the "Comus" and "Proteus" were very suitable boats and are quite suitable for the trade now.

The Commissioner: That is if you reproduce the "Proteus" it would not be out of date?

The Witness: I should say practically not. I don't mean by that but what the passenger accommodations might have some more bath rooms and things of that sort, as you might say, for the convenience of passengers, but the general type and character of the boat I think would not be out of place for that service.

[fol. 714] Q. Have you ever served yourself as an expert valuer of boats?

A. No, I have not particularly, although I have made a great many estimates for people who used the information in connection with valuing boats of that sort.

Q. That is, you kept yourself acquainted with values of boats?

A. Not particularly, no more than for just the purpose of conducting our estimates.

Q. You are an expert more on the cost of building?

A. Yes.

Q. And the price of new boats?

A. Particularly.

Q. And also of course on repairs?

A. And on repairs, yes.

Q. But not on the sale values?

A. No.

Q. Or on depreciation?

A. No, not on depreciation more than just from general knowledge.

Q. Are you familiar with the table known as the Stevenson Taylor table of depreciation?

A. No, I have never seen it.

Q. Do you know of any fixed percentage of depreciation for boats from year to year?

A. I know that from general knowledge, from my acquaintance with ship operating people, that the depreciation used by different companies ranges from 2½ per cent to five per cent.

Q. Depending on the policy of the company, I suppose?

A. I think this does not represent the actual physical change in value of the ships, but it represents more a policy of a company in conserving the assets, as you might say, of a corporation, which is really the policy of the directors of a company as to whether they

[fol. 715] wish to set up quickly a reserve fund or whether they wish to give the stockholders the benefit of their earnings and set up a fund which they think does not deplete the assets.

Q. A witness the other day, Mr. Palen, commented, you might say, rather adversely on the construction of the "Proteus" with reference particularly to side ports which he said made her unfit for ocean service. What can you say about that?

A. Well, of course, when you come into ocean service the side ports are not used because the side ports are put in there for convenience in loading in coastwise ports, and in coastwise trade we have always used them because the piers and everything were arranged for the side ports. When you come to use these ships in transatlantic service or trans-ocean service, it is a small matter to close up the ports, which they actually do, and put them in the ocean service if you don't want the ports for loading.

Q. Was that done during the war?

A. Actually in the case of the two ships which we delivered, as I say, in 1892, which are now operated by the government and have been ever since the Spanish War, they are used for service between the United States and Manila in connection with the Navy operations out there and have been sailing on the Pacific for the last twelve or fourteen years anyway.

Q. Did they have the ports originally?

A. Yes, they had the ports originally. I think they have all been closed up permanently, the ports riveted up.

[fol. 716] Q. As to some of these steamers of the Ward Line and Mallory Line and other steamers that were used in transatlantic service during the war, did you make changes in those?

A. I know a number of the ships that went into the trans-atlantic service, for instance, the "Neches" and the "Medina," that were used all the time in transatlantic service, and nearly all of the Old Dominion ships had had side ports originally. Whether they riveted the ports up I don't know. It is a small matter anyway.

Q. Is it a comparatively simple matter?

A. Yes.

Cross-examination by Mr. McGrann:

Q. What would it cost to make this change in the ports? Can you give an estimate?

The Commissioner: I cannot see the relevancy of that at all.

A. I can give it pretty close.

Q. I would like it to appear on the record.

Mr. McGrann: They went into it on direct examination.

A. I should say to rivet up the ports and put a butt strip on and rivet them up would cost about $100 a port. It is not a big item.

[fol. 717] Q. Would that be during 1918?

A. The figure is not close enough to apply to any particular date. It would cost about that at any time.

Mr. McGrann: I would like to see a job like that done at $10 a square foot.

The Commissioner: Suppose the boat was so small she could not possibly go across the ocean and was built originally to go from New York to Montauk Point and for that purpose only, and the boat had to go from New York to Montauk Point, and she was lost and it cost ten million dollars to buy a new one. Wouldn't that be the material thing?

Mr. McGrann: It would be the material thing if the boat were actually bought. Here we have a case where the boat was not bought.

The Commissioner: You have to get at it in this way: All my argument is based on the testimony that the cost of reproduction theory is a fair basis to start on to get the value of the thing.

Mr. McGrann: I shall contest that, of course.

The Commissioner: That is another proposition.

Mr. McGrann: Here is a case where the owner has not spent any moneys whatever for reproduction. If he now expended money for reproduction it would be very materially less. I don't know how much less it would be.

[fol. 718] The Commissioner: I see the point.

Mr. McGrann: He is in the same position. He has not reproduced the boat. Why should we pay for reproduction which he has not arranged for?

Q. You are not prepared to make an accurate estimate of the cost in 1918 of closing up these ports permanently on the "Proteus"?

A. No, but I would be very glad to get an accurate estimate and submit it to you.

Q. I would like to have that?

A. I will prepare it.

Q. How about putting double bottoms into the "Proteus"? *A.* Could that have been done?

A. She was built without double bottoms. That is not a very difficult thing, to put double bottoms into a ship after it is built.

Q. It is possible to do it?

A. Oh, yes. It is not customary because the ships are not built suitable for that.

Q. Mr. Palen, I understood you to make a distinction in your answer—the question was asked you what the cost of reproduction of the "Proteus" as of August, 1918, would be, and I notice in your answer you emphasize that the price would be so and so. Did you have any distinction in your mind?

A. Yes, the figure I gave was based upon the actual cost of producing the ship at our plant plus what we would have charged in that market, and that charge before the market was closed and after the market was open.

[fol. 719] The Commissioner: But you give yourself the same rate of profit as you did in 1900?

The Witness: Yes.

Q. Are you at liberty to say what the plus was? I don't want you to divulge any of your trade secrets.

The Commissioner: Two and one-half times the plus in 1900?
Mr. McGrann: I would like to know what it was.
Mr. Burlingham: Anything that you can tell to the Standard Oil Company is of course confidential and secret.

A. The plus I used here was 17½ per cent, and it amounted to $261,450.

The Commissioner: What was the plus in 1900 on the original boat?
The Witness: The plus in 1900 was about ten per cent.
The Commissioner: Was that the prevailing rate of plus in 1900?
The Witness: Yes, at that time it was a very low market. In 1918 it varied all the way from fifteen to twenty-five per cent. We were charging usually 17½ per cent after the market opened.
The Commissioner: It made the same thing for you in 1918 that ten per cent made in 1900?
The Witness: Yes.

[fol. 720] Q. You were not actually asked in August, 1918, to give an estimate to the Southern Pacific Company or to any other concern interested to reproduce the "Proteus," were you?
A. I was asked sometime after August, 1918, by Mr. Jungen of the Southern Pacific Company to give him a figure of reproducing the "Proteus" in August, 1918, and I gave him a figure of $1,750,000.
Q. When was this you were asked to do that, to give him the figure?
A. Well, it was some months after the ship was lost. I would say offhand it was probably six months or a year, I don't remember the exact time.

The Commissioner: And you went all over it again the other day for Mr. Burlingham?
The Witness: I have since been over the estimate again.

Q. What I am seeking to learn is whether or not that estimate was requested for practical purposes or for purposes of evidence here?
A. I took the inquiry——

The Commissioner: As evidence, of course. I think it is fair cross examination to bring out the fact that he was told that the figure was going to be used in a law suit.
The Witness: I am perfectly willing to say that when Mr. Jungen asked me for this figure he did not say it was to be used in a law [fol. 721] suit, and I didn't at the time assume that it was. Simply I gave him a figure, and then when I gave him the figure we could not take an order at that time, because we were under requisition by the government and had no capacity to take an order.
The Commissioner: You mean to say you thought that he might be considering actually having a new boat.

The Witness: I did not at the time. It did not occur to me just exactly what he did want it for. As a matter of fact when I got his letter I didn't know that the ship had actually been lost then.

The Commissioner: Could there be any difference between an estimate made by you for use as evidence and between an estimate made by you for the purpose of actually reproducing the "Proteus" in fact?

The Witness: No, none at all.

Q. You knew at the time you were making this estimate for Mr. Jungen that you could not reproduce?

A. Yes.

The Commissioner: Because of your relations to the government?

The Witness: Yes.

Q. Well, it was because you could not perform the work, wasn't it?

A. Yes, it was because our plant was entirely under the control [fol. 722] of the government as to its output.

The Commissioner: Because nobody could build it?

Mr. McGrann: That is what I am arriving at.

Q. To get back to this case, just tell me how you figured out the cost on the "Proteus"?

A. Well, the way we arrive at the cost is, that I ask our estimating department at the works to prepare an estimate on the actual cost of the labor and material, and that is usually done by a staff of estimators under the supervision of a head estimator, and the reason which you brought out about the estimate being then under different influences is explained by the way we make it, that the men who make this estimate and figure out the weights of the ship and apply the factors of the cost to these weights do not know what the estimate is for, and their only object is to get the estimate which may be the basis of the estimate which they prepare as nearly accurate as they can get it, and that is their whole employment with us, and then they furnish to me these figures of the estimated labor and material in our plant and then I take these figures and apply to these the cost of our expenses in connection with the handling of the work and any independent conditions that may prevail in the market as to a rising or declining market and use our judgment on that and also the amount of profit I think that the circumstances or the mar- [fol. 723] ket conditions justify.

Q. You are testifying as to a course adopted by your organization?

A. Yes.

Q. What I am seeking to learn is, what you actually did when you were called upon to give this estimate of the price of the "Proteus"?

A. I actually asked our organization to supply me with the figures of the estimated cost of the labor and material in accordance with our usual custom, and on these figures I based the selling price which I have given.

Q. Did you specify that it was to be an exact reproduction of the "Proteus"?

A. Yes.

Q. And did you make any changes whatever or any modifications in any way, or did you just say, "I want to know what it would cost to reproduce exactly the "Proteus"?

A. I asked them to give me an estimate for actually reproducing the "Proteus" on the designs as she was built.

Q. You are not able to state yourself what was allowed for labor and what was allowed for material, are you?

A. I have the figures which they submitted to me for the labor and material.

Q. I would like to have those, please?

A. The total material we have is $641,000. The total labor is $535,000. The total expense including our overhead and operating expenses was $268,000, and the cost of the plans, and patterns, was $50,000, so that that made a total figure of $1,494,000, as the actual cost to us to produce the ship. To this figure I added $261,450 for profits, making a total figure of $1,755,450.

[fol. 724] Q. Was there any time element taken into consideration?

A. No. I didn't consider the time.

Q. Could you state what would be the ordinary time of reproduction?

A. Why, the vessel ought to be built in ordinary times in about twelve months. What we actually do is when we are contracting for a vessel in a case of that sort, we estimate, as I say, the total material and labor at the time we make the estimate, then we actually place orders, I mean as soon as we can, and sometimes we get contracts even before we submit our prices on the amount of material in the construction.

The Commissioner: You tie yourself upon those prices?

The Witness: As much as we possibly can in order not to gamble on the market. We actually place orders and get covered for steel and copper and brass materials that we can purchase.

Q. You haven't made an estimate recently? By recently I mean for reproduction recently of a vessel of the type of the "Proteus" have you?

A. I haven't made an estimate except this one which is made on the August, 1918 basis, but in August, 1918, there was then in force at our plant what we call the second Macy Board award of wages, and soon after, I mean the first Macy Board award, and soon after that the second Macy Board was put in and the cost was materially increased right after the loss of this vessel. I can tell you when the [fol. 725] second Macy Board was put in operation, if you wish.

Q. I don't want to know that unless the second Macy Board is still in force?

A. The second Macy Board award was in force until about a month ago, when there has just recently been reductions in the wages of the shipbuilding plants; and even after the second Macy

Board award was put in effect we put in an increase over the second Macy Board award, some time last fall I think it was, and then on the 15th of this month we made a reduction in our wages, and that is the first reduction that has been made since the "Proteus" was lost.

Q. How about materials? Have there been any reductions in materials since August, 1918?

A. There was a decided increase in materials yes, but materials now are going down.

Q. You have referred to a sheet there in testifying, that bottom sheet. Are those the figures on which your estimate was based?

A. Yes.

Q. Is there any objection to having that marked in evidence?

Mr. Burlingham: He has given it all.

The Witness: I brought it along simply as a memorandum. I am perfectly willing to give all the information on here.

The Commissioner: Have you a copy of it?

Mr. McGrann: I would like to see a copy of it.

[fol. 726] The Commissioner: It is a summary of your testimony?

The Witness: Yes. I brought it along simply as a memorandum. I put down all the particulars of the vessel that I thought we might want to refer to.

Mr. Burlingham: You can read it and bring out anything you want.

Mr. McGrann: You don't object to the figures going in?

Mr. Burlingham: No.

Mr. McGrann: How can I attack this unless I know what the figures are?

Mr. Burlingham: Read it and bring it out. It is one thing to bring it out in testimony by question and answer, and another thing to file a document like that and spread it on the record.

The Commissioner: He has already told us about his profits.

Mr. McGrann: I can spread this on the record, of course, but I thought I would save time.

The Witness: I have given all the essential figures.

The Commissioner: If after reading it there are any questions that Mr. McGrann wants to bring out he can ask you about it.

Q. I see that you noted on here original contract price was $540,000, and that extras were $440, making a total of $540,440, as the original cost?

A. That is it exactly.

[fol. 727] Q. That is the original price as distinguished from costs?

A. Yes.

Q. And the profit under the original cost was $33,250?

A. Yes. That is right from our books.

Q. Whereas, the profit on the reproduction you have put down as $231,450, is that correct?

A. That is correct.

Q. The profit which you have estimated for the 1918 price is

eight times, or approximately eight times as much as the profit which you actually made on the 1900 construction, is that correct?

A. That is a question?

The Commissioner: That requires some mathematics, the difference between 17 per cent on the cost in 1918, and 10 per cent on the cost in 1900.

The Witness: If that is a question I wish to answer it. That is correct, but the conditions surrounding the business since the war, particularly taxes, make it incumbent on corporations to obtain a great deal larger profit in order to run their business at all, than they did in pre-war times.

Mr. McGrann: I move that be stricken out. I asked a simple question.

The Witness: I don't want to be criticised for charging too much profit, so that is the reason.

Mr. McGrann: I am not criticizing you.

The Court: That is all obvious and that is all mathematics that you are talking about now.

[fol. 728] Mr. McGrann: I understand you ruled that this could not go in?

Mr. Burlingham: The Commissioner has not ruled.

Mr. McGrann: I ask for a ruling.

Mr. Burlingham: He has not ruled as yet.

Mr. McGrann: I offer this document in evidence as the notes to which the witness has referred on his direct examination and from which he has testified.

Mr. Burlingham: The witness is here to answer any questions.

The Commissioner: For what purpose did you use that paper in giving your testimony?

The Witness: I used it just the same as I used this memorandum about these different positions I have held, because I did not wish to carry it—I could not carry all these things in my own mind, and I simply made a memorandum of them, so that I would be sure to be able to give accurate figures. It is impossible especially when I have general figures of cost, to carry them all in my mind.

The Commissioner: Is there any objection to the paper?

Mr. McGrann: It is the thing in very much greater detail.

The Commissioner: It is a complete summary of the testimony.

Mr. McGrann: You can see at a glance what calculations have been made.

[fol. 729] The Commissioner: If it is a convenient summary of the testimony and they well let it go in by consent, it may be received.

Mr. Burlingham: I do not object to it.

Mr. McGrann: You understand that this is not to be divulged. I do not wish to force you to make any exposition of any trade secrets or anything of that sort.

The Commissioner: In any case you could put in anything suggested by it in question and answer.

Mr. McGrann: I suppose I could, but it would take some time.

Mr. Burlingham: I withdraw any objection to it.

The Commissioner: For what purpose are you offering that?

Mr. McGrann: To show how the witness has arrived at his estimate for 1918.

Mr. Burlingham: It will save a lot of cross examination.

Mr. McGrann: It shows in detail how he arrived at it. I should think it would be as much for the advantage of the other side as mine.

The Commissioner: It is in evidence.

The Witness: We have no trade secrets.

Q. What is the dead weight tonnage, do you know, of this "Proteus?"

A. No, I do not.

[fol. 730] Mr. Burlingham: What tonnage are you asking for?

Mr. McGrann: I asked for the dead weight tonnage.

Mr. Burlingham: We have it somewhere.

Mr. McGrann: I know what it is in the testimony. Some said 4,000 and some said 4,800.

Paper received in evidence and marked Standard Oil Exhibit No. 1, Mach 31, 1921.

The Witness. The total in long tons, 2,240 pounds to the ton, and the total means the cargo space and water space and stores and things like that—the cargo alone, the amount of cargo you can carry in long tons is 2,778, according to this paper, and you add to that the coal, water, stores and so on, and you get 3,830.

Q. According to this statement of Mr. Jungen's which Mr. Burlingham has produced, the cargo carrying capacity of this vessel is 2,778 long tons, is that it?

A. That is it, exactly.

Q. In salt water?

A. In salt water.

Q. You are not prepared to give the cost per ton, either registered net or dead weight, as representing the reproduction cost of vessels of this type in August, 1918, are you?

A. You mean from general knowledge?

[fol. 731] Q. Yes.

A. The only way I could give it is to take the actual figures here for this particular vessel.

Q. And divide it by those figures?

A. And take the reproduction cost I have given you and divide it by the total tonnage.

Q. Of the several tonnages?

A. Yes.

Q. What was in my mind was this: Did you at any time have any system of estimating reproduction per ton?

A. No, it is absolutely unreliable and we never used it.

Q. You never used that system?

A. No, we got right down to the estimates of cost and figured on the pounds of material and the cost per ton of material and the hours of labor and the cost per hour.

Q. You spoke of two vessels which are still in service twenty-nine years old. Can you give the names of those?

A. The "Prairie" and the "Dixie."

Q. Are those the boats you had in mind?

A. Yes, they are the ones I had in mind. There were four of them originally built, the "El Sud," the "El Nord" the "El Rio" and the "El Sid." We built the four. In the Spanish War they were purchased by the government and named the "Yosemite," the "Prairie," the "Dixie" and the "Buffalo." The "Yosemite" was lost since the Spanish War in Samoa, and the "Buffalo," I think was lost, too, and I think the "Prairie" and the "Dixie" are still in the service of the Navy Department.

[fol. 732] Q. Those were sold eight years after they were built?

A. Yes, they were delivered in 1892, and the Spanish War was in 1898—no, that would be only six years.

Q. They were built in 1892?

A. Yes, they were delivered in 1892.

Q. That would be six years?

A. Yes.

Q. Now, have you recently—say within the last ten years, built any vessels for the Southern Pacific?

A. The last four vessels I think were built less than ten years ago.

Q. What were those, please?

A. They were the "El Sol" class. I don't remember the names of them.

Q. How did they differ from the "Proteus"?

A. They were larger than the "Proteus."

Q. Any difference in the engine construction and boiler construction?

A. The general type of the vessel was the same. They were what I would call enlarged ships of this type, the "El Occidentia" and "El Orienta."

Q. Did they differ in engine design and boiler design?

A. No, not particularly. They had larger engines and boilers because they had more power, but the general design of the engine they used was about the same.

Q. What was the difference?

A. The original ships had what we call the Marshall valve gear on them, and the more recent ships had what we call the Link motion valve gear. That is the principal difference.

Q. Would you say that was an example of obsolescence in the original design?

[fol. 733] A. Well, I would say that the Marshall valve gear was used for a great many years on coastwise ships in America almost exclusively, and it was not used by builders in other countries, and in recent years we have adopted in America the general practice for the coastwise business that is used in other countries in designing engines.

The Commissioner: You found they were improvements?

The Witness: Yes, I think that it is an improvement.

Q. What I am driving at is this: In your estimate on this reproduction did you actually figure the exact duplication of the "Proteus"?

A. Yes, we figured an exact duplication and we took the exact

weights of the ship as they were exactly, and the estimates were *based* on those.

Q. And you took this as it was originally constructed or with any improvements?

A. No, we took it as it was originally constructed.

Q. Did that increase the cost? If you had to go and reproduce something that was in any measure obsolete, would that increase the cost?

A. No, I think it would probably make the cost less.

Q. You have not since this original estimate, Mr. Palen—which you say was from six months to a year, as I understand, after the "Proteus" was lost——

A. Yes.

Q. Have you since that time made any other estimates for reproduction of the "Proteus"?

A. Nothing more than revising this estimate.

[fol. 734] What I mean is, has the Southern Pacific applied to you since then?

A. I made at one time an estimate for reproducing her after the second Macey Board award was put in effect, and the figure that I got then as I remember it, was $1,975,000.

Q. Was that for the purpose of building or for their general information?

A. The way that came about was this: When Mr. Jungen asked me for an estimate for reproducing the "Proteus" I made it first on the basis of the then market. I didn't understand that he wanted it on the market of August, 1918, and after that he asked me to make the estimate on the basis of the August, 1918 market, so I happen to have it on both conditions.

Q. What I am trying to find out is whether or not the Southern Pacific ever made an effort, so far as you know, to have this vessel reproduced by your concern?

A. No, not specifically.

Q. You have made a sort of division here on this Standard Oil Exhibit No. 1 of this date. The top line is miscellaneous items, Nos. 1 to 8. Generally just what does that mean?

A. You mean what is miscellaneous items there, of Nos. 1 to 8.

Q. Yes, they are on the same line. Did this miscellaneous item refer to something else?

A. The numbers 1 to 8 are the numbers used in our cost system. We have a cost system in detail showing all the different items of cost that come under that charge of Nos. 1 to 8, and that is simply [fol. 735] a notation from our estimators in order to separate the items of the different classes.

Q. Take the next line, steel, Nos. 9 and 10 and 12. Is that the same?

A. That is the same; the numbers 9, 10 and 12 are charge numbers that are in our cost system so as to designate the charges generally of steel work, and we have to separate them in this way, because the price of steel and the labor for working steel is different

than the price of miscellaneous items and the labor thereof in connection with miscellaneous items.

Q. The items of machinery I presume included engines, boilers and all auxiliaries?

A. Yes.

Q. And this item of expenses you have already testified I believe was your overhead?

A. Yes.

Q. $268,000?

A. Yes.

Q. Didn't you have the plans and patterns already for the "Proteus"?

A. Yes, we had those.

Q. Why make an extra charge of $50,000?

A. Because this figure here is based upon reproducing the ship in our plant, where we had the plans and patterns. Now, then, in order to arrive at a reproduction cost in the general market it was necessary for me to add the cost of the plans and patterns, because we had that advantage in the end, and if any one else in the general market was estimating on it they would have to figure on making the plans and patterns, so I simply added the cost of those.

[fol. 736] Q. But if you had actually constructed this vessel you would not have made another charge for those, would you?

A. That depends.

The Commissioner: Suppose they would not—they were in existence.

Mr. McGrann: Yes, they were in existence. I presume they were paid for them.

The Witness: They are our property.

The Commissioner: The title to them belongs to the shipbuilder.

The Witness: Yes, and in making the estimate of what it would cost to reproduce the ship, unless the ship was built at our plant some one would have to make the plans and patterns, and it is an item of cost in building the ship. You see the point, do you not?

The Commissioner: Perfectly, yes. Your cost for building two ships exactly alike, or your charge for them would be less than twice the cost of building one?

The Witness: Yes, on account of the plans and patterns and moulds.

The Commissioner: Therefore, that is to be considered if you were called upon to reproduce? Suppose a week after the "Proteus" was built the first year in 1900—say in 1901 they said, "We want another like it, what would that cost?"

The Witness: They would get it at a less price on account of [fol. 737] certain things we would have, particularly plans and patterns and moulds. As a matter of fact we were building the "Comus" and "Proteus," and the cost per ship originally was less than it would have been if one ship only had been built at that time.

The Commissioner: The query is whether you should include the

cost of the patterns in what you would charge in August, 1918, to reproduce the "Proteus."

Mr. McGrann: That is what I was trying to find out.

The Witness: That usually depends on market conditions. If the market is such that we can get an advantage of that in additional profit, we usually take the advantage of it.

The Commissioner: You had one profit on that particular set of plans.

The Witness: Yes.

Q. I would like to know more specifically if you can tell me just what date you made this estimate which is Standard Oil Exhibit No. 1 of this date?

A. On that?

Q. Yes.

A. I made it day before yesterday, finally.

Redirect examination by Mr. Burlingham:

Q. Were the "Proteus" and the "Comus" built at the same time? Were they both laid down in the yard at the same time?

[fol. 738] A. At the same time and sister ships and all under one contract for a total sum for the two of them.

Q. And this sum which is noted on the second page in the exhibit referred to at the bottom is one-half of that?

A. Of the total sum.

Q. If one of them had been built alone it would have cost considerably more?

A. Yes, it would cost somewhat more.

The Commissioner: Half the cost of the patterns more.

Mr. Burlingham: The moulds, too.

Q. Roughly, can you estimate that?

A. Roughly, I should say it would have cost $20,000 more.

Mr. Burlingham: That is all with this witness. I offer this letter in evidence to show the dimensions, tonnage capacity and dead weight capacity, etc., of the ship.

Paper received in evidence and marked Southern Pacific Exhibit A of this date, March 31, 1921.

The Commissioner: If in 1901 you had been ordered to build another "Proteus" and you were asked what you would charge for building another "Proteus," you would have excluded the cost of the things you already had on hand by virtue of having built the first "Proteus"—is that so?

[fol. 739] The Witness: The way that would be handled is, the estimators would send up to me the cost of reproducing the thing in our plant with whatever plans and patterns we had. If the market conditions were such that I felt justified myself in adding that much extra because we had that advantage over our competitors, I would

have added that. If on the other hand it was a very depressed market we sometimes do not take it. It is a matter of business judgment.

The Commissioner: If you could get it you would have asked for it?

The Witness: Yes. I have that advantage over our competitors, and sometimes they have that advantage over me; and when we duplicate a ship built by somebody else and we are asked to bid on it and somebody else has the plans and patterns, they have that advantage over us.

By Mr. McGrann:

Q. Under the same reasoning, then, I take it, that the labor charges are all subject to decrease if you so choose for this reason, that the draftsmen do not have to labor to produce drawings and designs which you already have.

The Commissioner: I thought the labor was involved in the cost?

The Witness: It is.

[fol. 740] Q. You have added some labor, haven't you, for drafting, etc.?

A. No, it is in this item of plans and patterns.

Q. How much is that?

A. That is in that item, that is the principal thing that that item consists of.

Q. And of course you would not have to redesign a new "Proteus" when you were instructed to duplicate it, would you?

A. No, sir, we could use the old patterns again.

The Commissioner: Did you do the designing?

The Witness: Yes.

The Commissioner: And is the cost of designing put down separately on this paper?

The Witness: No, not separately, but it is put down under the heading of plans and patterns. Plans mean designing.

The Commissioner: And I have got the total figures that include the items of that class that you would not have to do over again?

The Witness: Yes.

Adjourned to Thursday, April 7, 1921, at 10.30 A. M.

[fol. 741] April 7, 1921.

Mr. Burlingham: I have a letter from Mr. Palen, witness at the last session, saying (reading): "We estimate that it will cost about $500 per port to close these ports. This figure is higher than the one I gave at the hearing and has been arrived at after giving this matter further consideration."

Mr. McGrann: I want to again call for the production of the insurance values of the Proteus and also the book value of the Southern Pacific Company showing any valuation which the com-

pany itself placed on the Proteus, as or about shortly prior to the date of the loss, August, 1918.

Mr. Neeley: We declined to produce them the last time and we again decline.

Mr. McGrann: Unless you can show us some authority; I have searched the records and I am unable to show a case exactly like this, and I am afraid if the burden is put on me to do that at this time I shall be at a loss. I would like to have a ruling on that.

The Commissioner: It seems to me immaterial.

Mr. McGrann: There is a case by Judge Hough, I understand, in which he permitted—not under similar circumstances, I admit, as [fol. 742] this case—the production of the books of the corporation to show values, and I believe it was used against the corporation.

The Commissioner: A book entry is an admission against interest, but it is of such slight value in the case when we are going into actual value, and it might be admissible as some evidence but so slight.

Mr. McGrann: I think it would have some weight. It might be very inappreciable, really, but it might have some weight.

The Commissioner: You want me to direct them to produce the evidence of value that they carried the Proteus at on their books?

Mr. McGrann: Yes, and then I should like to know how they insured the Proteus.

Mr. Neeley: We decline again. It is just as irrelevant.

The Commissioner: I suppose, theoretically, that any admission or statement of fact made by you in your book would be evidence as an admission.

Mr. Neeley: If it is relevant.

The Commissioner: Yes, it is relevant.

Mr. Neeley: Is it relevant?

The Commissioner: The issue is value, so any statement you make as to value is an admission. It is not conclusive and it is not binding. I will reserve decision.

[fol. 743] The Master: I would like to ask whether it is conceded that the "Proteus" was the kind of a vessel for which there would be or would have been a market value in normal times?

Mr. Burlingham: Why, of course, I think we have to concede that, don't we, Mr. McGrann? I concede it, I know.

Mr. McGrann: I would concede that there would be a very restricted market, when we say market, which would of course affect the market value in that the "Proteus" was a very special construction. I think that is brought out in all of the testimony.

The Master: Yes, that is true, and that is why I asked the question whether it was the kind of a vessel according to the authorities. The authorities distinguish the question of determining value between the kind of a vessel that can fairly be said to have a market value and the kind of a vessel that cannot be said to have a market value.

Mr. Burlingham: I think certainly she is not an unusual type of coastwise vessel. She is a coastwise vessel.

The Master: It is limited to that.

Mr. Burlingham: And Mr. Palen indicated that by changes of a

structural—of a very minor character she could have been made available for transatlantic service, and therefore I maintain that there was a wide market for such a boat.

The Master: In normal times.

Mr. Burlingham: In normal times.

The Master: Well, do you agree, or don't you?

[fol. 744] Mr. McGrann: I would not agree that there would be a market value for the purposes of transatlantic use in normal times.

The Master: We are not talking about that, we are simply talking about whether there is a market value for any purpose. It may be that a vessel that can only run from Brooklyn to New York would have a market, and there might be a market value for that vessel, and the fact that you could not go to Europe would be immaterial.

Mr. Burlingham: If there is any question avout it, I can prove it.

Mr. McGrann: Well, certainly there was not a marked value in fact at that time.

The Master: I know that, but I am talking about normal times.

Mr. McGrann: A market value in normal times?

The Master: Yes. I am talking about that.

Mr. McGrann: I presume there was; I don't know.

Mr. Burlingham: I think we can put it this way, striking all that out and put this in place of it: It is conceded that in normal times with no requisitioning there was a market for such vessels as the "Proteus" and she had a market value, but that counsel do not agree as to the extent of that market, Mr. Burlingham claiming for the "Porteus" that there was a wide market, and Mr. McGrann claiming for the "Cushing" that there was a very limited and narrow market on account of the peculiar character of the boat. Is that right, Mr. McGrann?

[fol. 745] Mr. McGrann: Yes. If I were stating it, I would say a little more forcibly that if you asked as a fact whether or not there was a market value for this p-rticular kind of vessel in normal times, I must admit that I do not know. I would be willing to concede that the vessel could be sold for something or other in normal times, but I maintain that it is a very restricted market.

The Master: All right, but that doesn't answer the question. However restricted the market may be, it may nevertheless be a market.

Mr McGrann: Yes.

The Master: You don't mean that it was restricted except geographically and territorially, do you?

Mr. McGrann: I mean to say I do not think anybody would have bought the "Proteus" in normal times, that is what I mean to say. You might have sold her for junk or something.

The Master: That is what I want to know. I did not understand you meant that.

Mr McGrann: I really do not believe that the "Proteus" could have been sold in the sense that you speak of a market for vessels.

Mr. Burlingham: Then you maintain there is no market value.

The Master: You do not admit it?

Mr. McGrann: I do not agree with it at all.

Mr Burlingham: If you want any evidence on that, the case is still open and I will produce evidence if you regard it as important.

The Master: You gentlemen know as much as I do about what [fol. 746] the authorities say on this subject, of course, but in the cases we have looked up here it seems to me that the Court would say first is this the kind of a vessel which can be said to have had a market value at the time she was lost. If so, the market value is the value to be ascertained. But if not, if owing to peculiar circumstances, the fact she was built for a particular purpose that nobody else cared to have anything to do with, there was not any market value, then you can go into the question of what it would cost to build her over again and take off depreciation. But that theory could never be followed except in a case where there is no market value. And so I was wondering what your views were.

Mr. McGrann: It may be against my interest to say so, but I really think that there certainly was not a market for the vessel at the time because of the restrictions on sales, for one thing.

The Master: I know that very well, and that is why I said in normal times. I also know that you probably could not have reconstructed the vessel at the time, because you could not have gotten anybody to do it. Those are difficulties to be met, but in trying to solve the problem I want to clear up the underbrush and see first whether it was a vessel for which there was a market value.

Mr. Burlingham: I have to admit that there was a market value to the "Proteus" without the requisitioning.

The Master: Of course it may be argued on the theory presented [fol. 747] by you, that even though there was a market value and would have been a market value in normal times perhaps, we cannot go into that question in this case because as a matter of fact a person could not have bought it no matter how much he might want to; and then on the other theory which we are permitted to go into that case, he could not either, because we find them, regardless of what the cost might have been, you could not have got it at any price, people were not building and you could not have reproduced it at that time, or that is what one witness, at any rate, said. If the Southern Pacific had wanted, the day after the "Proteus" was sunk, to build a new "Proteus", they could not have built it for five million dollars, could they?

Mr. Burlingham: Yes, they could.

The Master: Well, what I mean is, that being so this becomes a very, very special case for which there is no authority, and we have got to find a new rule, haven't we?

Mr. McGrann; There is still the third rule which I have read in the book, I don't know how it applies to this, and that is, what is the value as a going concern, to the owner.

The Master: You have to exclude that in this case.

Mr. McGrann: But nevertheless, this going value was lost as of that time. And there again we have the element of the requisition by the Railroad Administration, which did not expire for a year or so after that loss.

The Master: How about this. None of the rules which we have read about can be applied here because of the peculiar condition. [fol. 748] Now, we have to make a peculiar rule, haven't we? We are not laying down law for future generations, but we have to fix what is fair in this case, haven't we?

Mr. McGrann: That is what we are both working at.

The Master: We have got to do that. How would this be? Do we know the time when the "Proteus" would have been returned by the government to the owner if she had not been sunk?

Mr. McGrann: Yes.

The Master: We know that time. What is that time?

Mr. McGrann: That time is in that contract which has been marked as an exhibit.

The Master: I haven't got it here.

Mr. Burlingham: I have forgotten.

Mr. McGrann: I cannot state the time on the record, because I do not recall.

Mr. Burlingham: I fancy about the spring of 1919, wasn't it?

Mr. McGrann: I think it was April 1, 1919.

The Master: Subject to correction it is agreed that if the "Proteus" had not been lost she would have returned to the owners by the government on April 1, 1919. Is that the time when the "Proteus" would have been returned, or is it the time when all boats requisitioned were returned?

Mr. McGrann: All. The Railroad Administration surrendered all floating equipment.

[fol. 749] The Master: That was the time when the Railroad Administration surrendered all ships that had been requisitioned?

Mr. McGrann: Yes.

The Master: Then she would have got it back. Now, do we know how much the owner would have gotten out of the government from the time the ship was lost until April 1, 1919?

Mr. Burlingham: The charter would show that.

The Master: Can we agree on that?

Mr. Burlingham: I do not think we can; I do not think so.

Mr. McGrann: The contract provides for it.

The Master: I haven't got it here.

Mr. Burlingham: I will tell you why we cannot. Because when the Central settled for a lump sum for their whole fleet—

The Master: Weren't they entitled, as a matter of law, to something that could be ascertained?

Mr. McGrann: I think there is, in the reading of the contract. I saw that there was a specific amount mentioned for the floating equipment, but in that floating equipment there was all conditions of craft.

Mr. Burlingham: All these railroads, where a railroad company owned floating equipment, what the government did try to do was to try to ascertain what the standard return was, that was their principle, for the whole business, and that is what they paid, never taking it boat by boat. That is for the income for the use of the railroad [fol. 750] company's property. If they paid for a lost vessel, they

had to ascertain distinctly what that was worth, but when it came to treating the whole matter of piers, floats and ships and railroad property, they made a very elaborate investigation in accordance with rules laid down by the Interstate Commerce Commission and their own modifications of those rules and ascertained what the standard return was for a period which is fixed in the statute which dates back to a certain day, I don't remember, in 1917, or something, for three years, to see what their earnings had been, and they settled on that basis and it was found impossible to distinguish one boat from another. You could not find out in a month of Sundays what they paid for a particular boat.

The Master: Then the question I had was: The market was there after April 1st?

Mr. McGrann: Oh, yes.

The Master: And what was the market value, or can the market value of the "Proteus", or what its market value would have been, if it had been alive after April 1st, 1919, be determined.

Mr. Burlingham: It can.

The Master: Well, even if it can, which Mr. McGrann may not agree to, because he says it hasn't any market value, then, why should not the owners—why wouldn't it be fair in this particular case to give the owner the reasonable market value at the time when there was a market, plus what the owner would have gotten from [fol. 751] the government until that time, and if that can be ascertained, as Mr. Burlingham says, with interest on it from the date of the sinking. There is no authority for that, but——

Mr. Burlingham (interrupting): It is a very reasonable theory.

The Master: That is the idea I have worked out myself of what appears to me to be fair in this case; then we would not be dealing with fictitious things or fanciful figures.

Mr. Burlingham: I will think it over and see.

The Master: I would like you to tell me whether that theory is silly, or whether you have a better one?

Mr. Burlingham: We will approach it by a series of negations as a substitute for these impossible theories.

The Master: Yes, because of this unusual situation for which the general rules were not intended.

Mr. Burlingham: Because, as I say, we are really in a realm of hypothesis. If it be true that you could not rebuild it——

The Master: Yes, and you could not sell it and you could not get a new one.

Mr. Burlingham: Yes.

The Master: Then let us wait until this extraordinary situation comes to an end and give the owner what he would have earned, or if not, interest on the money until the day of the sinking, and then within a reasonable time after the market opened, what its value was at that time.

[fol. 752] Mr. Burlingham: I will read the record and bring in my views on that.

The Master: I do not think the record is good enough for me to make findings, do you?

Mr. Burlingham: No, I do not.

Mr. McGrann: How about that value, are you going to give us any of your information on that?

Mr Burlingham: On what?

Mr. McGrann: On the insured value?

Mr. Burlingham: No, not unless I am compelled to.

Mr. McGrann: How about the book value? You were going to be generous enough to give me that.

Mr. Burlingham: I told you what it was.

Mr. McGrann: Well, you mentioned some figures here, but I did not make a note of it.

The Master: He told you privately and told me privately, and said he would see his principal client and find out whether they had any objection to telling you officially.

Mr Burlingham: I will let you know about that next time.

Mr. McGrann: I wrote to the War Risk Insurance Bureau, and I have in my hand their reply, and I am informed that an examination of their records does not disclose any insurance except on cargo of the Comus and Proteus.

Mr. Burlingham: An examination of our records and those of the War Risk Insurance Bureau discloses that we insured cargo for- [fol. 753] warded on the Comus and also on the Proteus but we did not carry insurance on either hull.

Mr. McGrann: I am not inclined to accept that statement because I have sources of other information to the contrary.

Mr. Burlingham: You are cross examining your own letter.

Mr. McGrann: Not at all: I am simply informing the Commissioner of what I am endeavoring to do.

The Commissioner: What do you want to do?

Mr. McGrann: I want to adjourn until Thursday with leave to offer further evidence. Last evening I got other information from other sources about the insurance.

Mr. Burlingham: May I ask the source?

Mr. McGrann: The Standard Oil Company of New Jersey, and I want to have an opportunity of investigating to see whether or not there was any other insurance.

The Commissioner: You are referring now to insurance placed by the Goverment at the time that it had the vessel, or have you information that there was insurance placed on the vessel during the war period?

Mr. McGrann: That is what I am seeking.

The Commissioner: That would be received in evidence.

Mr. McGrann: And also if insurance was placed at about this time I should like to offer those and have them passed upon.

[fol. 754] Mr. Burlingham: Let us argue the case with that reservation.

The Commissioner: Very well, you may do so, and what you say may be made a matter of record.

Mr. Burlingham: In response to a request for information as to the value at which the Southern Pacific Company carried the steamship Proteus on its books, I have ascertained and will place

on record subject to my objection that it is immaterial and irrelevant, the following statement which I received from the Southern Pacific Company:

"On August 19, 1918, the Southern Pacific Company was carrying the Steamship Proteus on its books at a value of $224,986.49. This was arrived at by writing off 3¾ per cent per annum for eighteen years. This is the method adopted by the Southern Pacific Company in the case of all its steamers and results in writing off 75 per cent of the cost of a ship in twenty years, the balance, 25 per cent, being considered salvage value."

Mr. McGrann: I have nothing further except to request that we adjourn for a week or so.

Mr. Burlingham: Why don't you state what you really want to do about this? I do not think it is on the record as to exactly what you want. What are you trying to prove by this insurance?

[fol. 755] Mr. McGrann: I think it is very clear. I have asked time and again for the insured value of the Proteus at the nearest date to her loss, whether it was government or private owned.

The Commissioner: When the Government had it and was under control to make good to the owner in the event of her loss, under those circumstances if the Government insured the boat, then the value placed on the boat for the purpose of insurance may be received as some evidence.

Mr. Burlingham: Do you deny that this statement is correct that you produced from the Treasury Department in Washington—a letter which you have just read here?

The Commissioner: He is not bound by it.

Mr. Burlingham: Do you state this is the fact or not the fact or don't you know?

Mr. McGrann: I don't know. I have stated I don't know.

Mr. Burlingham: And you want to adjourn to see whether it is or not?

The Commissioner: He says that he has other sources of information than this letter.

Mr. McGrann: I will go further than that, and it is for the Commissioner to rule; but if I discover that there is insurance by private insurers on this hull at this time I wish to offer that as evidence and have it passed upon, whether it is admissible or not, and I think I am about to find out something about some other insurance.

[fol. 756] The Commissioner: All right, you could do that possibly within a week?

Mr. McGrann: I am about to find out some insurance on this vessel. Of course I have appealed to you to let me have that information. The people who are the best informed on that are your own clients.

The Commissioner: They did not insure it during the war, did they?

Mr. McGrann: I believe they did. I am trying to find out whether the insurance followed the Railroad Administration or not.

The Commissioner: You can argue the case now if you wish.

Mr. Burlingham: In the absence of a market, which is the case here, as far as I can learn from the authorities, in which there is considerable difference, the statement contained in Roscoe in regard to damages under maritime clauses would seem to apply, particularly the case of Harmonides, 1903 P. I., in which it is stated there are several factors that can be taken into consideration. One is the initial cost. Second, the manner in which the vessel has been kept up. Third, the length of time in which she has been in use. Fourth, the profit which the claimant obtains. Fifth, evidence of the cost of a new and similar ship at the time of collision. Sixth, any other fact which has a direct bearing on the value as a bona fide offer to purchase. Seventh, the value of the vessel to her owners as a going concern.

[fol. 757] Most of those we have covered here. Some of them are extremely difficult if not impossible to cover under the circumstances. It seems to me that the method adopted of ascertaining value by the witnesses called by the petitioner and by the claimant is a very reasonable and fair one to adopt. They all adopted the same method, the three witnesses on my side and the three witnesses on Mr. McGrann's side. The only difference is as to the cost of reproduction which our witnesses took at $1,750,000, and those on the other side took at two or two and one half times the original cost of the ship, which seems to me entirely unscientific and inaccurate in view of the definite testimony of Mr. Palen of Newport News Dry Dock & Shipbuilding Company.

Again, the rate of depreciation which some of the witnesses said should be five per cent per annum, the five per cent reckoned on the depreciated value of each cost at the end of the year, and the others said that under the circumstances they thought it should be less, and that method did not give any weight to the very great appreciation in ship values.

I seems to me that the evidence of the three men whom I called on the direct question of value—Mr. Martin, the best known surveyor in this country who served on boards for the Government during the war, and Mr. Raymond and Mr. Smith—important steamship owners and presidents of their respective companies, is better [fol. 758] evidence than that produced by the other side. One of the witnesses for the other side was no doubt an accomplished yacht designer and all that sort of thing, but as to the other two it seems to me their experience was not comparable to that of my witnesses, but of course that goes to the weight of the evidence and I will have to leave that to the Commissioner. But it seems to me that these practical men on both sides have adopted the same method which is a fair enough method for us and for the Court in the absence of a better one especially.

The Commissioner: I have stated what has seemed to me to be the possible objection to the method, namely, that it involves in the first place the cost of reproduction at the time when the vessel could not

have been reproduced. That objection does not seem to either side to be fatal to the theory.

Mr. Burlingham: It seems to be hypothetical.

The Commissioner: It is not hypothetical.

Mr. Burlingham: It makes the valuation highly hypothetical.

The Commissioner: On my suggestion you both abandoned the market value theory on the ground there was not any market and it could not have been sold. It seems to me the method you both agreed on could be objected to for the same reason. But if, having made that observation, both sides nevertheless are ready to rest on the record as it is I am ready to take it and do the best I can with it. [fol. 759] Mr. Burlingham: I should like to refer you, Mr. Commissioner, to a case by no means strictly analogous—to the case of H. F. Dimock, 77 Federal Reporter, 226, where the value of Mr. Vanderbilt's yacht Alva was named, and the Court said there:

"It is very apparent that in the case at bar, the owner of the Alva would fall far short of being put in the same condition as if the injury had not been suffered, if the narrow rule of market value was adopted."

The Commissioner: I understand the point.

Mr. Burlingham: That I think covers the case pretty well.

Mr. McGrann: I had not expected to sum up this case today.

Mr. Burlingham: Give us a few of your notes, please.

Mr. McGrann: Do you want me to enter anything on the record?

The Commissioner: Yes, I think it should be taken down.

Mr. Burlingham: You had better make a little statement and you can submit a brief later.

Mr. McGrann: I have started out and still do continue to take the position in this case that the burden of proof is on Mr. Burlingham to show what the value of this vessel is.

Mr. Burlingham: I feel it.

Mr. McGrann: I think that attitude is justified by law. As to the [fol. 760] testimony which I have offered here, that testimony has not been offered solely with a view of establishing on my part the value of the Proteus. It has been offered in rebuttal of what the witnesses for the Proteus have testified to, those witnesses as you say being Mr. Martin, a surveyor and appraiser, and two ship owners, Mr. Smith and Mr. Raymond. We have had a rather elaborate summing up in this case, so perhaps it is worth while to go into the testimony of those three witnesses in detail and show what I think is obvious on the record the discrepancies which do not support the conclusions they reach as to the value of this vessel.

The Commissioner: Assume they break down Mr. Burlingham's case, then what follows? Shall I find no value at all?

Mr. McGrann: I have produced three witnesses, I say, without having the object of establishing values, yet necessarily they did give their conclusions of the value somewhat on the same lines as were adopted by two of the others on the other side. I confess I do not see how Mr. Martin arrived at his valuation. It is not clear to

me. Mr. Raymond and Mr. Smith both followed certain laws, certain definite laws in reaching a conclusion. The witnesses I produced, two particularly from the Board of Appraisal, Mr. Gillmor and Mr. Swasey, have testified that they adopted the method which they would have used if they were sitting on the Board of Appraisal and appraising this vessel for government purposes. Of course the [fol. 761] premise is most important in this method of valuation of this vessel. By that I mean the figure on which they start as a basis for their subsequent calculation, and that is the value, by which I mean the replacement value of the vessel.

The Commissioner: But you have no objection to my finding from the record that there was a replacement value, have you?

Mr. McGrann: Well, I hesitate to concede that on the record. The Commissioner cannot fix a definite figure as to replacement value of this vessel for this reason: Mr. Palen has testified and offered certain figures as to what the Newport News Shipbuilding & Dry Dock Company charged or would charge if they had been ordered to construct this vessel, and if they could have done it at that time. I think that his figures should be considered in the light of what he has said, that is that it was substantially prohibitive. He gave the impression here I think in his testimony that those figures were abnormally high, and they were not figures on which it seems to me your honor can arrive at a conclusion as to what would have been a fair replacement value of this vessel.

The Commissioner: Assume that is so, how can I find what the value was? You are submitting a case on the record which I assume you think calls for a finding of value. You are urging that Mr. Burlingham has failed to sustain the burden of proof as to value, and that therefore I must find that no value has been proven. [fol. 762] Assume that, then you are taking some other basis, and what is that?

Mr. McGrann: It seems to me that there is sufficient evidence here for you to arrive at what would be a fair compensation to these owners for the loss of that vessel.

The Commissioner: Bearing in mind the figures of replacement value?

Mr. McGrann: And bearing in mind that the vessel was not replaced, that they have never expended any money for replacement, that they are recovering now at a time when the shipping industry is reaching its normal level,—and when I say normal, I mean the prices prevailing before the war, and we know the war created extraordinary circumstances in this case certainly; I think that you must not only take into consideration what these various appraisers have stated in a more or less empirical manner as to the method of arriving at their figure,—you must also take into consideration the initial cost of this vessel, the use of the vessel for eighteen years, the valuation which this company—the owners of this vessel themselves—placed on the vessel at that time, which was far below the claims now being made; and I hold that that statement of the owners is an admission which is a most important factor in this case.

I might point out that even if you find that you have to take a replacement value, and even if you take the excessive value which [fol. 763] Mr. Palen has put down, and as to which I call your attention to the discrepancy between his profits under his first cost and the prospective profits under the last estimated cost,—I say that even if you take his figure as a basis and apply the owners' methods of arriving at the value of this vessel to them, you will find that the valuation would be less than the valuation which the witnesses called by me have placed on this vessel.

The Commissioner: Of course the figures or the books do not change when conditions change. For instance if the market should go up and be ten times what it was, the bookkeeper would not change the figures on that valuation or the books; but that is taken up by what I have said about replacement value. I am not urging that that is the figure, but I am pointing out what would happen if you adopt their method of depreciation. I do not see how you can apply a hard and fast empirical method of getting at the value of this vessel.

The Commissioner: Here is no rule of damages here.

Mr. McGrann: Every scintilla of evidence must be taken. It seems to me that you can follow each line of reason.

The Commissioner: I will follow the different lines; and probably whatever position I take will be reversed.

Mr. McGrann: I hope not.

The Commissioner: I have no doubt of it. I think I know your position.

Mr. McGrann: I was going to suggest that you allow us to brief this case.

[fol. 764] The Commissioner: If you want to.

Mr. Burlingham: I am not going to do it.

The Commissioner: You do not have to but you may. The Commissioner would be very glad to have you.

Mr. McGrann: I was not expecting to be precipitated into an argument of this case.

Mr. Burlingham: You are not precipitated.

Adjourned to Wednesday, June 15, 1921, at 10:30 A. M.

June 15, 1921.

Mr. McGrann: At the last hearing I announced that I was still endeavoring to obtain some information concerning the insurance on the Proteus. Since that hearing I have pursued the matter with the result that I have been informed by the Bureau of War Risk Insurance that a cover was placed after the loss of the Proteus on Southern Pacific Company's vessels by the Railroad Administration, and in that insurance which was placed in October, two months after the loss of the Proteus, the Steamship Comus, which was a sister ship of the Proteus and which forms the subject of testimony here, was covered specifically and a valuation placed on her which I am

informed and I am prepared to give testimony to support was the [fol. 765] result of an agreem-nt between the Railroad Administration and the Southern Pacific Company as to the valuation of the Comus. I am prepared to offer that testimony for what it is worth and I ask that the Commissioner rule whether or not you will have it.

Mr. Burlingham: I object to it as irrelevant and immaterial.

The Commissioner: Objection overruled.

Mr. Burlingham: Exception.

Mr. McGrann: I may say that one of my witnesses, who told me that he would be glad to attend and give such information as he knows, which I think is quite valua'le, is in Washington today and will not return until possibly tomorrow afternoon or Friday; and I will have to ask for a further adjournment.

Mr. Burlingham: What is his name?

Mr. McGrann: His name is H. B. Walker.

The Commissioner: Perhaps you can tell Mr. Burlingham what the amount is and put it in subject to his objection.

Mr. McGrann: The sum of $690,000. for hull and all disbursements, which was the war risk cover for total loss.

[fol. 766] William C. Rader, called as a witness on behalf of the Standard Oil Company, being duly sworn, testified as follows:

Direct examination by Mr. McGrann:

Q. What is your present occupation?

A. Manager, Insurance Division, Marine Department, Standard Oil Company of New Jersey.

Q. Were you connected with the War Risk Insurance Bureau of our Government during the late war?

A. Yes, sir.

Q. In what capacity did you act?

A. May I ask a question? My title was changed three times while I was there. Would you rather confine it to the railroad activities?

Mr. McGrann: I don't know what.

Mr. Burlingham: Let us have all these titles.

Q. What were you during August, September and October, 1918?

A. Acting Commissioner of the Marine and Seamens Division.

Q. Were you at the head of that department?

A. Yes, sir.

Q. Do you know of any insurance that was taken out by the United States Railroad Adminstration covering the vessels which were then under its control?

A. Yes, sir.

Q. State what you know of that?

[fol. 767] Mr. Burlingham: Objected to.

The Commissioner: Only on the ground of irrelevancy.

A. In about October, some time in October, 1918, I received an application from Mr. William C. De Lanoy, who was then Director of Insurance for the Railroad Administration, requesting coverage on hulls and cargoes against war risk hazards on all vessels in coastwise service. This application was submitted to my advisory board for the reason that under the act the Bureau was not permitted to insure for any other government agency; and with the consent of the Secretary of the Treasury permission was granted the Bureau to write Insurance for the Railroad Administration. Sometime during the month of October a letter was received from Mr. De Lanoy to which reply was made that we could consider all vessels in coastwise service operated by the United States Railroad Administration including cargoes covered against war risk hazards, subject to an application to be submitted for approval by the Bureau of War Risk Insurance, and at a rate to be determined after the risk was ascertained. The period of cover was for thirty days from the date of attachment of vessel at her safe arrival in any port. Not until sometime in December did I receive figures indicating values on the respective hulls insured for coastwise lines. May I name the lines?

The Commissioner: No.

[fol. 768] Q. It is not necessary. Continue.

A. Indicating the value placed on each hull. These values were accepted without comment and without being subjected to correction on the basis of valuations under which the Bureau accepted insurance from other vessel owners, for the reason that the risk was insured and over by the time the valuations were received. There being no further need of insurance after November 11, the cargo covered was not completed in the matter of valuations until some time in January, 1919; and policies were not issued until subsequent to my resignation as acting commissioner, which took effect February 1st, 1919.

Q. Did the valuation placed on the Comus——

Mr. Burlingham (interrupting): Is this a leading question that you are about to ask?

Q. Do you know the valuation placed on the Steamship Comus for the purpose of this insurance in October?

Mr. Burlingham: Objected to as immaterial and irrelevant.

The Commissioner: Objection overruled.

Mr. Burlingham: Exception.

A. I do.

Q. What was it?

A. $690,000.

Q. What did that cover? Was there a disbursements insurance?

A. Hull and disbursements.

[fol. 769] Q. For the Commissioner's information and from your knowledge of the insurance methods of the Bureau what is meant by disbursements insurance?

A. Freight, earnings.

Q. Did that valuation cover both hull and disbursements?
A. Yes, sir.

The Commissioner: Does valuation on hull and disbursements mean the total value of the entire vessel at the time, loaded up?
The Witness: It does not include the cargo. It includes the freight but not the cargo.
The Commissioner: What is the difference between the fair market value and the value plus disbursements?
The Witness: The fair market value?
The Commissioner: Suppose there is a market today for a vessel and you are called upon to find the fair market value of it, would the value of the hull plus disbursements be any guide?
The Witness: We would accept it as such for insurance purposes, because a man would want to protect all his interest in his vessel. Ordinarily hull and disbursements is divided. Two thirds on the hull and machinery and one third on disbursements.
The Commissioner: And would disbursements mean the value of the thing as a going boat?
[fol. 770] The Witness: Yes, sir.
The Commissioner: That is fair, is it not?

Q. Are you able to say how this valuation was arrived at?

Mr. Burlingham. Same objection.
The Commissioner: Overruled.
Mr. Burlingham: Exception.

A. No, I am not.
Q. How did this figure come to the knowledge of the War Risk Bureau?
A. It was received by mail from Mr. H. B. Walker, Federal Manager of the Railroad Administration.

The Commissioner: Do you know whether in fixing the value for the purpose of insurance or fixing the amount of insurance, an attempt was made to arrive at actual value of the property insured?
The Witness: That I could not say. We accepted the value submitted by Mr. Walker, who I assume took the value indicated by the owners.

Q. You intimated that the bureau exercised some supervision of the amount of valuations placed?
A. Yes, sir.
Q. Did you have any system?
A. I had a scale valuation based on the age of the vessel and her dead weight tonnage.

[fol. 771] The Commissioner: Did you know how much the boat cost?
The Witness: I would not know how much the boat cost. The scale valuation was determined by my advisory board.

Q. And what was that scale valuation with respect to the Comus?

By the Commissioner:

Q. In using the fact that the vessel was eighteen years or fifteen years or a certain number of years old——

A. (Interrupting.) A cargo vessel.

Q. How would that face be used, unless you knew what the cost was or had some basis? Did you fix a basis by considering the cost?

A. How the advisory board arrived at that valuation I am unable to state.

Q. But you say the age of the vessel figured?

A. Yes, sir, one to five years, five to ten years, ten to fifteen years, fifteen to twenty years, twenty to twenty-five years, and so on.

Q. And what effect would the fact that the vessel was ten years old have.

A. It might reduce its scale value from $230. a ton possibly to $175. or $150. per dead weight ton.

Q. How was that fixed?

A. By the advisory board. I don't know how they arrived at the valuation.

Mr. McGrann: I have asked him what the figure was that the boat used. It may be detrimental to me.

[fol. 772] Mr. Burlingham: No, that is impossible.

Mr. McGrann: I want to give the Commissioner all the information obtainable.

By Mr. McGrann:

Q. What was the figure used for the vessel of the age of the Proteus and Comus?

Mr. Burlingham: He does not know how old they were.

A. How old was that vessel?

Q. Eighteen years.

A. Fifteen to twenty, about $175. a ton to the best of my recollection without referring to my schedule.

Q. Have you a schedule with you?

A. Yes, I have a schedule with me.

Q. I will ask you to refresh your recollection from that schedule.

The Commissioner: That would not help us unless we know what the basis was.

Q. You spoke of vessels from fifteen to twenty years old. That is the schedule I want.

Mr. Burlingham: I would like to have it noted that all this testimony is taken subject to my objection because I do not want to object to each question.

The Commissioner: That is understood.

The Witness: This is on cargo steamers, A–1, registered in Lloyds, [fol. 773] steel or iron, classified 15 to 20 years, per dead weight ton $175. That was a scale adopted for my use as acting commissioner of the War Risk Bureau on August 26, 1918, by the advisory board.

Q. What use did you make of that schedule?

Mr. Burlingham: He did not make any use of it.

A. All applications received for insurance,—the amount accepted would be determined by this scale and we would not accept anything in excess.

Q. That is, for valuation?

A. For valuation, for the purpose of insurance on hull and disbursements.

The Commissioner: That is the highest?

The Witness: Yes, that is the maximum.

The Commissioner: And would you say that the Comus was insured for the highest possible sum that it could have been insured for?

The Witness: Yes, sir, on that theory.

The Commissioner: That would seem to answer the question as to actual value, wouldn't it—or intention?

Mr. McGrann: I will offer this letter in evidence. I will ask another question.

Q. Can you state when this cover on the Comus attached?

A. The Comus attached at New York October 20, 1918.

[fol. 774] The Commissioner: And when was the figure arrived at? How long before that? When was it decided that the insurance should be in that particular sum?

The Witness: The insurance was accepted prior to the receipt of the valuation. We did not receive the valuation until December. The risk was over before we received the valuation.

Mr. McGrann: I think Mr. Walker can throw some light on that.

The Witness: Mr. Walker can throw some light on that, yes.

The Commissioner: And the valuation was intended to be a valuation as a cover?

The Witness: That is when the cover was placed.

Mr. McGrann: Yes.

The Commissioner: Suppose it had been lost within the thirty days, there would not have been any agreed value?

The Witness: We would have accepted the company's valuation.

The Commissioner: Would you?

The Witness: Yes, sir.

The Commissioner: Wouldn't you have inquired and said "You are putting on too much?"

The Witness: No doubt we would.

The Commissioner: Or were your set rules such that this would have been the valuation that would necessarily follow as a matter [fol. 775] of mathematics from your own rule by which you were bound?

The Witness: Had the risk continued after the month of October, immediately on the list having been received I would have checked up those values in accordance with our scale valuation by which the acceptances by the Bureau were governed.

The Commissioner: If the vessel had been lost within that thirty days and before this figure was received, there was no way on which you could have avoided paying that figure?

The Witness: No, sir, except to this extent——

The Commissioner (interrupting): So you determined the value by certain rules which produced this value?

The Witness: Yes, sir.

The Commissioner: Then do you agree it is material—the fact that this was far before the value was put on?

Mr. Burlingham: I would not say.

Mr. McGrann: I don't know whether that is true. I have not talked with Mr. Walker.

The Commissioner: Unless it is it will throw the whole business out.

Mr. Burlingham: Is that all?

Mr. McGrann: Yes.

Mr. Burlingham: I wish to ask a few questions.

[fol. 776] Mr. McGrann: But first I want to offer the letter in evidence previously referred to from the special advisor, in charge of marine and seamen's division, Washington, dated June 10, 1921.

Mr. Burlingham: I do not object to the competency of the document itself, but I object in that the facts therein set forth are immaterial and irrelevant.

The Master: Objection overruled.

Mr. Burlingham: Exception.

Received in evidence and marked S. O. Exhibit 1 of this date.

Cross-examination by Mr. Burlingham:

Q. You use this table that you refer to as a sort of a check, I suppose, on values?

A. Yes, sir.

Q. And according to this table at the time in question you were valuing cargo ships at $175 per dead weight ton, is that right?

A. Yes, sir.

Q. So that if the ship in question was 4,000 tons dead weight, you would have given her a value of $730,000?

A. Yes.

Q. That being so, you were safe in insuring the boat?

A. Yes.

Q. Supposed you learned that the vessel in question is not only a freight steamer but a passenger steamer; do you have any schedule or table on that?

A. No, we have no scale for a combination cargo and passenger vessel.

[fol. 777] Q. Of course you know that a combination freight and passenger vessel is worth more than a freight vessel? You know that from your experience as a steamship man, don't you?

A. Well, at times, and then again they are not. They are at the present day, but it would not figure much in the insurance.

Q. Generally speaking it would cost a great deal more to build a freight and passenger combination steamer than a freight steamer, would it not?

A. I should judge so.

Q. Haven't you had experience in the matter?

A. Not in building passenger boats. I am more familiar with cargo and tankers.

Q. You have been with the Standard Oil Company sometime, have you not?

A. Two years.

Q. How long?

A. Only about two years or two and a half.

Q. Before that what was your experience?

A. I was in the Bureau two and one half years.

Q. And before that?

A. I was with Shearson & Hammill, on Wall Street, I would have to go back sometime to get my marine experience again.

Q. Where was your marine experence acquired?

A. With Park & Tilford. I placed their cover. I was a placer.

Q. In Marine insurance?

A. Marine insurance mostly.

Q. To cover their importations?

A. Yes.

Q. Wines, for instance?

A. General commodities.

Q. Marcaroni?

A. Anything they had afloat.

[fol. 778] Q. You are not a shipping man, you are by long experience an insurance man?

A. Yes, I am not a shipping man.

Q. But you are perfectly familiar with the customs of marine insurance?

A. Yes.

Q. And not much on hulls as cargoes?

A. That is right.

Q. You know what the technical meaning of "disbursements insurance" is, don't you?

A. Yes.

Q. It is a means, is it not, by which an owner obtains additional insurance?

A. Yes.

Q. On his vessel?

A. Largely for the purpose of getting a low rate of insurance.

The Commissioner: In addition to what?

The Witness: In addition to the hull and machinery.

Q. It is quite a different thing from insurance on freight?

A. Yes.

The Commisioner: I think that he said freight was disbursements.

The Witness: It is earnings.

Mr. Burlingham: I am showing he was mistaken.
The Witness: Earnings are not considered freight.

Q. It is a mere—— .
A. (Interrupting.) Term.
Q. It is a mere conventional term?
A. Yes, sir.
[fol. 779] Q. Under which a ship owner obtained additional insurance?
A. Yes, sir.

The Commissioner: It would tend to indicate, perhaps, that the amount they placed was too much?
The Witness: Yes, sir.
Mr. McGrann: It involved certain elements.
Mr. Burlingham: It is my turn now. He is my witness.
The Witness: May I add that of course disbursements are only collectible in case of total loss.

Q. And the premium is very low?
A. Yes, sir, on that account.
Q. As compared with the hull insurance?
A. Yes.
Q. And that is the reason the owners prefer to have as large an amount in disbursements as possible, is it not?
A. Yes, sir.
Q. I observe in this letter which Mr. McGrann has offered in evidence just now that the Treasury Department advises his firm that "Policy No 27151 was issued on May 15th, 1919, for account of United States Railroad Administration to cover the hull of the S. S. Comus (Southern Pacific S. S. Line) in the sum of $690,000, valued at $690.000." There is nothing said there about disbursements, you observe?
A. I would have to see the policy to determine that. That is written by a clerk who is not familiar with the terms of insurance.
[fol. 780] Q. On the face of it, it does not cover disbursements?
A. No, it does not, but it does not indicate the terms of the policy.

The Commissioner: Do you know of your own knowledge that that covered disbursements?
The Witness: No, I would have to see the policy. I am speaking of my knowledge of similar policies.

Q. And you may be basing your statements on your familiarity with the ignorance of clerks, is that it?
A. No, not exactly.
Q. I observe the words "in the sum"—and I wish to call your attention particularly to them, "in the sum of $690,000, valued at $690,000." If that means anything that means that is the value of the hull?
A. Yes, but the value submitted, or the list on which the values were submitted indicates that would cover hull and disbursements.

Q. How do you know that?
A. My list proves it, the list submitted by the Railroad Administration so indicates.
Q. Have you got it here?
A. Yes.
Q. Let me see it?
A. Yes (producing list).
Q. Where did you get this?
A. That is a copy of what I had in Washington.
Q. Who submitted it to you?
A. Mr. Walker, Mr. H. B. Walker.
Q. He was the Federal Manager?
A. Yes.
Q. Of the coastwise lines?
A. Yes, sir.
[fol. 781] Q. In this district?
A. Yes, sir.
Q. The Atlantic district?
A. Yes, sir.
Q. And you think he is more likely to be right than the Mr. Peters who signed the letter to Mr. McGrann? Is that the way your mind works?
A. Yes, sir.
Q. I see in this list that you have produced a considerable number of vessels valued at over a million dollars?
A. Yes, sir.
Q. Would your limitation of insurance there be $175 a ton?
A. I could not tell. I must know the age.

The Commissioner: $175 applies to fifteen to twenty years of age.
The Witness: Yes.

Q. A boat fifteen to twenty years old could be $175?
A. Yes, sir.
Q. And there is no difference between fifteen and twenty?
A. No, sir.
Q. You could not be chopping logic on this supject when we were at war, I suppose; you just took it in a rough way?
A. I don't know how the advisory board arrived at that valuation. I am not able to state. Of course we were there to help the merchant shippers obtain protection.
Q. Do you know when this paper was submitted to you, what month?
A. I think about December 6th; I am not positive.
Q. And the war being then over, the importance to you was to get your premiums I suppose?
A. Yes, sir.
[fol. 782] Q. That was your main object in life?
A. Yes, sir, the risk was over. We had no further hazard.
Q. Do you feel yourself sufficiently expert in the matter of values of steamships to give an opinion as to the real value of a coastwise freight and passenger steamer?

A. No, sir.

Q. Would you even in regard to tankers have any knowledge?

A. I would only base my valuations at the present time on the knowledge I obtained in the War Risk Bureau which covered that.

Q. Who was your advisory board?

A. It consisted of Henden Chupp, William N. Davey, and William R. Hedge.

Q. And when in doubt they were consulted, is that right?

A. Yes, sir.

Q. Your superintendent or the director was Mr. De Lanoy?

A. Yes, William C. De Lanoy.

Q. Have you got the scale with you?

A. Yes, sir.

Q. Let me see it.

A. Yes (producing paper).

Q. Do you know who prepared it?

A. It is signed William N. Davey, for the Advisory Board.

Q. I see it is signed by Chupp and Davey?

A. Yes, it is signed by Chupp and Davey. Mr. Hedge was not there to sign it. He was present at the meetings usually.

Q. I do not see in this any provision for freight and passenger steamers?

A. No, sir, because the Bureau was established largely to take care of trans-atlantic war zone shipping, and it was only when the U- [fol. 783] boats made their visitation on the Atlantic coast that this contingency had to be provided for, and there was no standard.

Q. And so this advisory committee on board got one up in a hurry for you?

A. Yes, sir.

Q. And this is it?

A. Yes, sir, and they told me to base it on the same valuation, subject to approval.

Q. What does that mean?

A. For instance, had the risk continued, in checking up the values of the vessels if I found it was too high I would cut it down.

Q. Or too low?

A. No, I would not tell them I would take any more.

Q. You would not, but someone else might suggest that they be changed?

A. If they would come to me with the application I would consider it.

Q. I suppose you were a fair man and they were fair?

A. Yes.

Q. And you wanted to do the right thing?

A. Yes, sir. We did everything we could to help and not to hinder, and I did avoid red tape wherever I could.

Q. It did not say anything about disbursements in this scale valuation?

A. No, sir.

Q. And the other document which you received from Mr. Walker

is described in the title as giving the name of vessel, the freight and date of attachment, and amount of war risk insurance on hull for a period of thirty days from date of attachment, and it is only in the [fol. 784] last column that somebody thought of adding "and disbursements." You observe that, don't you, described as "hull"?

A. Yes, I take it that way. That is how they valued it. That is how the value is arrived at. That is the amount of hull disbursements.

Q. But in the table furnished you by Messrs. Chupp and Davey there is no reference to disbursements whatever. The valuation you would give and the insurance that you would give would be on the hull proper at that rate, $175 per ton, wouldn't it?

A. It would depend on how the policy reads.

Q. For all we know approval might be obtained for an additional sum for disbursements?

A. I doubt it. If my recollection is right it includes disbursements in the policy.

Q. There is the thing itself. It is not a matter of recollection. There is the table itself drawn by two of the most careful men in New York in the insurance world, and not a word about disbursements insurance.

Mr. McGrann: But the policy would govern.

The Witness: The policy would determine the payment of the loss.

Q. Let us have the policy.

A. I haven't got it with me. I have a specimen copy.

The Commissioner: We do not care about anything except the one on the Comus.

[fol. 785] The Witness: You would have to get it from Washington.

Mr. McGrann: I will get it if it is obtainable.

The Witness: I rather think you will find it includes disbursements.

Mr. Burlingham: That is all I want. When are you going to have Mr. Walker here?

Mr. McGrann: As soon as he comes back to New York.

The Witness: The application for insurance contains conditions which form part of the policy irrespective of conditions appearing in the policy.

Q. Who made the application in this case, the Railroad Administration?

A. They did not file the usual form. This was their application; we would have requested them to sign each individual application had the risk continued.

Q. What do you mean by saying this was their application? You mean this list of Mr. Walker's?

A. Yes sir, this list. We did not compel them to comply with the formalities that we asked other applicants for instance to do.

The Commissioner: Then the terms and conditions that would have been in the application if it had been required would not be in this case?

The Witness: It would form a part of the policy.

[fol. 786] By Mr. McGrann:

Q. And this application which you term the list that you produced and showed Mr. Burlingham has on it $690,000 for the Comus under hull and disbursements?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

The Commissioner: You mean to say it would have had it on if they made it?

The Witness: No, it is on this list.

Mr. McGrann: I ask to have these papers or tables referred to by Mr. Rader marked for identification.

Marked S. O. Exhibits 2 and 3 for Identification.

June 17, 1921.

H. B. Walker, called as a witness on behalf of the Petitioner, being duly sworn, testified as follows:

Direct examination by Mr. McGrann:

Q. Mr. Walker, what position did you occupy about October, 1918?

A. Federal Manager of the Coastwise Steamship Lines of the United States Railroad Administration.

[fol. 787] Standard Oil Exhibit 3 to Testimony of H. B. Walker

(Letterhead of Treasury Department)

August 26, 1918.

Steamer Hull Valuations

Lake-built, not ocean-going, refer to the Board.

" " now ocean-going, and now classed, deduct 10%.

On deadweight tonnage, allow 10% in excess of 2½ times net tonnage.

Steamer Valuations

(Steel & Iron)

(Classed 1 in American Records or 100 A 1 in Lloyds Register)

American, Neutral and Japanese

Cargo Steamers—A 1 Steel:

Class 1—Not over 1 yr. old per deadweight ton.....	$200
Class 2—Over 2 and not over 5 yrs. old per deadweight ton.	195
Class 3—5 to 10 years old per deadweight ton.....	190
Class 4—Over 10 years and not over 15 per deadweight ton.	180
Class 5—Over 15 years and not over 20 per deadweight ton.	175
Class 6—Over 20 years and not over 25 per deadweight ton.	160
Class 7—Over 25 years per deadweight ton.....	150

Tank Steamers:

Class 1—Not over 1 yr. old per deadweight ton.....	250
Class 2—Over 2 and not over 5 yrs. old per deadweight ton.	240
[fol. 788] Class 3—5 to 10 years old per deadweight ton..	230
Class 4—Over 10 years and not over 15 per deadweight ton.	210
Class 5—Over 15 years and not over 20 per deadweight ton.	187.50
Class 6—Over 20 years and not over 25 per deadweight ton.	165
Class 7—Over 25 years per deadweight ton.....	150

British, French, Italian and Greek 1/3 off the above amounts.

10% off if not classed.

In the case of a steamer being rebuilt or furnished with new boilers, 60% of the cost of the improvements or betterments to be added to the value as of the year the expenditure is made. This does not apply to expense of ordinary repairs or upkeep.

Deduct 20% on wooden steamers.

In the case of steamers of foreign friendly flags, if charterer be an American citizen or corporation under terms which require the charterer to furnish War Risk Insurance, in the event of the charter party providing the amount of war insurance, which must be furnished by the charterers, the Bureau can write policies up to such an amount.

Recommended by:

(Signed) Hendon Chubb, W. N. Davey, Advisory Board.

To William C. Delanoy, Director Bureau of War Risk Insurance Washington, D. C.

[fol. 789] Q. And where were your headquarters?

A. Per 49 North River, New York.

Q. Do you recall, and if so, can you state briefly, the circumstances of any cover for insurance purposes which was applied for and received by the United States Railroad Administration with the War Risk Bureau, covering coastwise vessels, and particularly those of the Southern Pacific Company at that time?

Mr. Burlingham: That is objected to as immaterial and irrelevant.

The Commissioner: I will allow it.

Mr. Burlingham: I suggest that all this testimony be taken subject to my objection.

The Commissioner: I so order.

The Witness: We received a communication from the Manager of the Marine Insurance Section of the Railroad Administration, Mr. W. C. De Lanoy, in October, stating that they were going to place a cover, covering a war risk, and we were asked to send them a statement of the vessels and their tonnages, with the valuations, which we did do. I have never seen the policy, and had nothing to do with placing it.

Q. Did you yourself have to *to* with the forwarding of the list containing the valuations?

A. No, that was sent by the Federal Auditor.

[fol. 790] Q. Did you have anything to do with the preparation of the valuations, and, particularly, with respect to the Comus, of the Southern Pacific Company?

A. We sent them a list and that was gone over in my office, but the basis of that list was the insurance that we were carrying on the vessels, and that included all the Southern Pacific ships; that is, the hull and machinery insurance; not the war risk insurance.

The Commissioner: I thought you were talking about the war insurance?

The Witness: Yes, covering the war risk.

The Commissioner: Then they were insured independently of that?

The Witness: Oh, yes.

The Commisioner: Was the value put on for a war risk different from the value put on for insurance otherwise?

The Witness: I think it was the same, generally.

By Mr. McGrann:

Q. Did any representative of the Southern Pacific Company—and by that I mean the owning company, of course—have any conference with you or take any part with you at the time of the placement of this value for the war risk insurance, which it was testified was placed on the Comus during October, 1918?

[fol. 791] A. When you say "a representative of the Southern Pacific," do you mean some one in their employ?

Q. Yes.
A. No.
Q. Well, did any one representing the Southern Pacific?
A. No.
Q. How did you arrive at this value?
A. We had as assistant to the Federal Manager the former manager of the Southern Pacific, Atlantic Steamship Lines. We had also the representative of the Ocean Steamship Company. He was another assistant to the Federal Manager. I had been formerly employed by the Old Dominion Steamship Company, which was another one of the lines, and we three, with our Federal auditor, sat in and fixed these amounts and sent them down to Washington.

The Commissioner: That is, the amounts for war risk?
The Witness: Yes, the values.

Q. Now, are you betraying any confidence, Mr. Walker, by stating or giving us the names of the men whom you mentioned as the former manager and assistant manager?
A. Mr. E. R. Richardson was one of the Assistant Federal Managers, and Mr. C. W. Junger was another. Mr. Baker was the Federal Auditor.
Q. Had you known Mr. Junger before the days of the Railroad Administration?
A. For many years.
Q. What had been in his position prior to that time?
A. Manager of the Southern Pacific Steamship Lines.
[fol. 792] Q. Had you known Mr. Richardson previously?
A. Yes, sir.
Q. And what had been his position?
A. He had been Traffic Manager of the Ocean Steamship Company.
Q. You said something about previous insurance, or I gained from what you said that you referred to some existing insurance. Was that correct? Did you refer to some existing insurance?

Mr. Burlingham: Existing insurance on what?
Mr. McGrann: On the Comus, or on any of the vessels of the Southern Pacific Company, or whatever he referred to.
The Witness: We carried hull and disbursement insurance on all coastwise ships.
The Commissioner: Well, not on the Proteus?
The Witness: I had nothing to do with the Proteus. She was gone before my day.
The Commissioner: She was gone before your day?
The Witness: Yes.

Q. Do I understand that that insurance was carried by the respective owners prior to their taking over by the Railroad Administration?
A. Yes, sir.

Q. Are you able to state, and if so, I ask you to state, what was that insurance on the Comus?

[fol. 793] A. My information is it was $600,000, and then increased some time during the year or during the term of insurance, to $690,000.

Q. And did that include disbursements, or was it on the hull purely and simply—the hull and machinery?

A. I could not tell you just how the Southern Pacific handled that insurance.

The Commissioner: How was it handled by you, in the War Risk?

Mr. McGrann: No, he was in the Railroad Administration.

The Witness: The disbursements would not apply to that. You would only use the total amount on your war risk insurance.

Q. Can you tell us what the reason of continuing this insurance, if you did continue it, after the vessels were transferred to the Railroad Administration? By that I mean do you know of any agreement between the Railroad Administration and the Southern Pacific Company concerning insurance?

A. No.

The Commissioner: You knew of the liability on the part of the government that would exist in the event the boat was lost?

The Witness: The government decided to carry the insurance, but there was no agreement as between the government and the owners.

[fol. 794] The Commissioner: In order to protect itself?

The Witness: Exactly.

The Commissioner: You say it generally took the figure at which the particular vessel was insured prior to the time the government took it?

The Witness: We were carrying the insurance that we had on the vessels, and that was the insurance that we covered under the war risk. Now, whether that was what they had prior or not, I am not testifying as to that, because I have no knowledge of what they had prior to when they came under government control.

The Commissioner: I mean at the time the government took that boat over, if it was insured for general purposes at a particular sum, you adopt that sum for the war risk, without making any independent determination of the question of actual value?

The Witness: No, I did not say that. The government took over all these lines on the first day of January, 1918. Some of the insurance on some of the vessels expired at different periods of the year, and at their expiration they were renewed by the Railroad Administration. I think there was a short interim there when they did not carry any insurance, but I am not quite sure about that.

[fol. 795] The Commissioner: When the Railroad Administration came to renew the insurance, what steps did it take to ascertain the amount?

The Witness: We took the values that they had been previously insured for.

The Commissioner: Without making any independent examination to ascertain the actual value at the time?

The Witness: Yes.

By Mr. McGrann:

Q. In this particular cover to which I referred, October, 1918, being the date which appears on the record, do I understand that you and Mr. Junger and Mr. Richardson and Mr. Baker—

Mr. Burlingham: You lead him all the time. If there is any man who does not need to be led, it is H. B. Walker.

Mr. McGrann: I apologize for leading.

Mr. Burlingham: He keeps on saying, "Do I understand" what he wants him to answer.

Mr. McGrann: I want to make it perfectly clear on the record as to how they arrived at the insurance. I think we may assume that they considered this and arrived at the conclusion that that was the valuation of the Comus.

Mr. Burlingham: He has never said anything of the sort.

[fol. 796] The Commissioner: All of this is taken subject to your objection. Of course, this leaves it open to be explained what he means by "valuation".

Mr. McGrann: I mean the sum of $690,000.

The Commissioner: He has already said they did not make any independent investigation to find the value; that they found out what value had been placed previously and they took that amount as the amount of the insurance they would take.

Mr. Burlingham: That is what he said.

Mr. McGrann: Just go back and read the record. I want to know what the fact is.

The Commissioner: The question was what they did for the purpose of ascertaining the value.

Mr. McGrann: Yes.

The Commissioner: And he has already told us that——

Mr. McGrann: But I would I would like to know what the question and answer was.

(Record read by the reporter.)

By Mr. McGrann:

Q. Well, in order to clarify the matter, I will ask you again, Mr. Walker, to state what was done in preparation of the list which you sent, or which your auditor sent to the War Risk Bureau covering [fol. 797] the Comus during October, 1918?

A. We took the valuation of the Comus, as well as all the other ships, that was shown in the hull and disbursement policies.

Q. And who furnished you with the hull and disbursement policies?

A. Our Federal Auditor.

Q. Was that Mr. Baker?

A. Mr. Baker.

Q. And you do not know, I presume, where he got them?

A. No, I do not.

Q. What I am seeking to learn, Mr. Walker, is this: Did you receive any information from the owner of the Comus, the Southern Pacific Company on which you based the figure which appears in that list—and I will present to you the list later, but I think you know the list I mean?

A. My recollection is that those policies were turned over to the Federal Auditor, and the reason I said "No" before was because I was not positive about it; and we would get that information from the face of the policy.

The Commissioner: Anyhow, you took the figures from the policies. That is the point.

Mr. McGrann: The point I am seeking to ascertain—and I seem to run up against a stone wall whenever I try——

The Commissioner: Excuse me for being a stone wall.

Mr. McGrann: I am not referring to you, Mr. Commissioner; but I feel that if I can put my hand on the witness or if I can know [fol. 798] all of the facts, that somewhere it will be shown that the Southern Pacific Company either acquiesced or agreed or furnished a figure to the Railroad Administration on which this figure was based—$690,000.

Mr. Birmingham: Do you wish this pious talk recorded in the record?

Mr. McGrann: I certainly do.

The Commissioner: Well, did they not furnish it, in a way, by furnishing the policy that they had carried up to that time?

The Witness: That is the only thing they could furnish.

The Commissioner: And they supplied the government with a policy showing that that boat was insured at so much money, and the government took that figure when it reinsured or when it put on the War Risk insurance without going into it itself to see whether it was too big or too little.

The Witness: Yes.

The Commissioner: Well, whether as a matter of law you have any estoppel against the Southern Pacific on that, I do not know. That is a question of law.

Mr. Burlingham: I do not think you should argue it. I think you should go on and examine the witness.

Mr. McGrann: My information was, and I am going to state it on the record to show why I called this witness——

[fol. 799] Mr. Birmingham: That is not necessary. I object to your stating it. I object to all speeches on the record.

Mr. McGrann: I will state this on the record: I called on Mr. Birmingham to produce all the information bearing on this matter. I have gone as far as I can.

Mr. Burlingham: That is a call that requires no answer; it is too vague and general.

Mr. McGrann: Of course I reserve the right to go farther as soon as I can locate this horrible list.

Mr. Burlingham: Why not call Mr. Rader? That man puts everything he ever possessed in his pocket again. If you will call up Mr. Rader you will get it. He will bring it here in five minutes.

The Commissioner: What person or department of the Southern Pacific Company would supply any information, if the company did supply information, to the Railroad Administration? Who is at the head of that department? Subpœna him and find out whether any information went from that department.

(Informal discussion off the record.)

The Commissioner: In your deliberations or in your proceedings which resulted in your placing war risk insurance, did you consider the fact that if the boats were lost the government would be liable, [fol. 800] and endeavor to fix the value at a figure that would protect you in case of loss?

The Witness: We did not undertake to do that.

The Commissioner: That covers it, does it not?

By Mr. McGrann:

Q. Who has the policy, do you know, Mr. Walker?

A. It is probably on file with the United States Railroad Administration, Marine Insurance Section.

Q. Is that in Washington?

A. Washington, D. C.

(Informal discussion off the record.)

By Mr. McGrann:

Q. I present to you what has been marked S. O. No. 2, of June 15th, and ask you if you can identify that as a list to which reference has been made here (handing paper to witness).

A. Yes, that is the list of the vessels and their valuations, as shown here for hull and disbursements. I cannot say definitely that this is a copy of the list which was originally sent.

Mr. Burlingham: But you think so, do you not?

The Witness: Well, I never saw the list itself. I recognize the ships and their names, and so on.

[fol. 801] Mr. McGrann: I will ask that that be marked as an exhibit.

The Commissioner: Do you want the whole thing?

Mr. McGrann: Yes.

The Commissioner: Why not have an admission on the record with respect to the Comus?

Mr. McGrann: All right.

Mr. Burlingham: No, if it goes in it should all go in. I object to the whole thing.

Mr. McGrann: I offer it as covering the Comus.

The Commissioner: It is received.

(Paper marked Exhibit S. O., 2, in evidence.)

Mr. Burlingham: Is that all?
Mr. McGrann: I have nothing further.

Cross-examination by Mr. Burlingham:

Q. You said the Proteus was gone before your day. She was lost on the 19th of August, 1918, and you took charge as Federal Manager——
A. Early in September.
Q. In September?
A. Yes.
Q. It was the U-boat scare that led this War Risk insurance, I suppose?
A. Yes, sir.
Q. When the German U-boats were in our waters?
A. Expected in the West Indies and the South.
Q. And were you requested by the Director General to take out insurance?
A. No, sir, he decided to take that himself.
[fol. 802] Q. And were you requested to put in an application?
A. No, sir, that was done through Mr. Delanoy, the Manager of the Marine Section.
Q. Well, what is this document, S. O. Exhibit 2?
A. That is a list of the vessels which were under Federal control.
Q. Coastwise?
A. Coastwise vessels, yes.

Mr. McGrann: Referring to Exhibit No. 2?
Mr. Burlingham: Yes, I said so.

Q. At what time?
A. October 16, 1918.
Q. Now, the title of it is, "Statement of vessels showing name of boat and date of attachment and amount of war risk insurance on hull for period of 30 days from date of attachment." You will observe it says, "Insurance on hull," but the last column, where certain figures are given, is headed, "Amount of hull and disbursement insurance." Will you kindly explain that difference, if there is any?
A. Well, that is simply an expression of the auditor who prepared that. We were called upon to carry out war insurance, and used, as a valuation, the total amount of the hull and disbursement insurance.
Q. So as a factor or element in determining the amount of war risk insurance to be placed on all these coastwise vessels, information was desired as to the amount of hull and disbursement marine risk insurance that being carried; is that right?
A. Right.
[fol. 803] The Commissioner: Not only that, but they actually followed it. It was not one step, it was the final thing that decided it.

By Mr. Burlingham:

Q. Did you ever see this document, S. O. Exhibit 3 for Identification, June 15, 1921, or one of which it is a copy (handing paper to witness)?

A. I have no recollection of it.

Q. It is signed by Hendon Chubb and W. N. Davey, Advisory Board, and purports to give steamer hull valuations on vessels of certain classes, classified according to age. You know nothing about that?

A. I have no recollection of having seen it.

Q. The other day Mr. Rader testified here that that document which I have just shown you fixed the limits beyond which insurance would not be taken out—war risk insurance—by the Railroad Administration. Do you know anything about that?

A. No, sir.

Mr. McGrann: Not by the Railroad Administration.

Mr. Burlingham: By whom?

Mr. McGrann: By the War Risk Bureau.

Mr. Burlingham: Oh, I should have said accepted by the War Risk Bureau.

By Mr. Burlingham:

Q. Do you know anything about that?

A. Nothing whatever.

[fol. 804] Q. Mr. McGrann has asked you a very considerable number of questions, apparently with a view to determining whether these valuations on S. O. Exhibit 2, represented a value agreed on between the Southern Pacific or the owners and the Railroad Administration. Do they or do they not represent any such agreement?

A. They do not.

Q. Was any such agreement made?

A. No.

Q. In determining the matter or the question of how much compensation should be made by the government through the Railroad Administration to owners in case of loss, was the question of valuation left open, or was it settled in any way?

A. It was left open.

Q. For negotiation, I suppose?

A. Yes.

Q. Then these figures in the right hand column of S. O. Exhibit 2 do not represent the opinion or judgment of yourself and your associates, Mr. Richardson, Mr. Junger and Mr. Baker, as to the true values of these vessels, do they?

A. No, sir.

Q. When did you cease to be Federal Manager, Mr. Walker?

A. September 1, 1919.

Q. And you have no connection whatever with the government now, have you?

A. None whatever.

Q. How long have you been in the steamship business?
A. Thirty-seven years.
Q. Depreciation of vessels, is there any standard of depreciation that is used by all steamship owners?

[fol. 805] Mr. McGrann: I object to that as improper cross examination. He is your witness now.
The Commissioner: Certainly.
Mr. Burlingham: If you wish, yes.

The Witness: No.

By Mr. Burlingham:

Q. It differs with different companies according to their policy?
A. Yes.

Mr. Burlingham: If I should venture to ask him the question as to what he thought the value of this boat was, it would be cross examination because Mr. McGrann has tried to find out whether that was the idea that Baker and Jungen and Richardson and he had as to the value of that boat. Am I not right?
Mr. McGrann: No.
The Commissioner: He has stated they made no attempt to value the boat; that they did not value the boat. They simply went through the form of getting insurance the same amount that had been on the boat before.
Mr. Burlingham: But that is not my point. My point is that Mr. McGrann has opened the door as to this witness by asking him the distinct question of whether this was a value fixed by these gentlemen, and he cannot close it by saying, "No."
[fol. 806] Mr. McGrann: May I state my objection?
Mr. Burlingham: Let me put this question:

Q. What do you think the value of the Proteus was in August, 1918, or the Comus, I will say.

Mr. McGrann: I object to the question, in the first place, in that it is improper cross examination. In the second place, if you make Mr. Walker your witness, he has not certainly been qualified on the record to state what the value of the Comus is, without challenging at all Mr. Walker's long experience. Now, as to your statement that I have opened the door, I may say, I think you have misconceived the whole line of my examination, which was directed to ascertaining what agreement, if any, had been made between the Southern Pacific Company, as owner, and the Railroad Administration as to the particular adopted insured value.
Mr. Burlingham: And what value four gentlemen put on it, of whom he was one.
Mr. McGrann: I did not bring in the real value at all of this vessel. I said that they agreed on this particular $690,000.
Mr. Burlingham: That was not your only question. Maybe that was your purpose, but I maintain, Mr. Commissioner, that the record

[fol. 807] discloses very clearly that Mr. McGrann wished, if possible, to prove that $690,00- was a value agreed upon not only with the Southern Pacific Company, or the respective owners, but by these three gentlemen, and I think for that reason I have a right to ask him——

The Commissioner: It is rather psychological—your position. I suppose he will argue that he called him to show at what sum the government insured the boat.

Mr. Burlingham: No.

The Commissioner: And then he proposes to argue from that that they insured it at its full value.

Mr. Burlingham: Not at all, I respectfully submit, because in marine insurance there is a valuation, and what he wanted was something much more important than the amount of the insurance or the cover; he wanted to know what valuation was in the policy; that is what he was asking. That is the whole thing he was interested in.

Mr. McGrann: I wanted to know if the minds of the Southern Pacific Company and of the Railroad Administration met on this figure as a representative figure for a total loss of the hull and disbursements.

[fol. 808] The Commissioner: You also, in addition to that, wanted to know, regardless of an agreement between the Southern Pacific—you wanted to know the figure at which the government had insured the vessel against war risk?

Mr. McGrann: Yes, but I did not——

The Commissioner: And your object in getting that figure was to use it as evidence of value?

Mr. McGrann: Certainly, but that does not qualify this witness.

The Commissioner: Therefore, your objection is very thin, when you say he cannot ask him what the value is. I will overrule it.

Mr. McGrann: Exception.

Mr. Burlingham: Go ahead, Mr. Walker, and answer.

The Witness: I would not care to express an opinion about the valuation.

By Mr. Burlingham:

Q. You are perfectly capable of expressing an opinion are you not?

A. In fixing a value on a ship I would want to look over the ship and determine from that impression——

The Commissioner: Have you any opinion with respect to the actual value of the Comus at the time she was insured for $690,000?

The Witness: No, sir.

[fol. 809] By Mr. Burlingham:

Q. Mr. Walker, I am still cross examining you. You were President of the Old Dominion Steamship Company?

A. Yes.

Q. Which owned how many coastwise ships?
A. Eight.
Q. Ranging up to what tonnage?
A. Up to about four thousand tons.
Q. You certainly know the class of vessels of the Southern Pacific Company?
A. Yes.
Q. The Proteus and the Comus, the two sister ships built in 1900?
A. Yes, sir.
Q. Those ships were built at the Newport News Shipbuilding & Dry Dock Company's yard in 1900, at a cost of $557,600 each. They were 405 feet over all; 390 feet between perpendiculars; 48 feet beam; 32 feet 9 inches in depth; 3,006 tons net, and 4,836 gross register, with a dead weight capacity of 4,000 tons single screw, steel, triple expansion engines, Scotch boilers; speed 15 knots; and in 1909 she was re-boilered at a cost of $90,000, and re-fitted with refrigerating apparatus, and large refrigerating boxes; and in 1910 or 1912 she had 13 staterooms added; and she was well kept up by her owners. What, in your opinion was the value of the Proteus at the time of her loss in August, 1918?

Mr. McGrann: I object to the question that has been propounded to the witness, first, as improper cross examination. Second, that the form of the question is insufficient and is incorrect in certain par- [fol. 810] ticulars, and especially the valuation of $557,000 and odd dollars. Thirdly, that the witness has already said that he is unable to place a valuation on the Comus.
The Commissioner: How about that part of the objection that has to do with the correctness of the figures?
Mr. Burlingham: I will stand on the record on that.
The Commissioner: Objection overruled.

By Mr. Burlingham:

Q. What is your answer?
A. I wouldn't care to express an opinion until I could do some figuring on it, on the particulars which you have given.

The Commissioner: If you have not a real opinion, of course you cannot give one.
The Witness: That is the reason I am not giving one.

By Mr. Burlingham:

Q. You do not wish to get into this; is that it?
A. I had rather not.
Q. Is that on account of your relations to the Railroad Administration?
A. Yes, sir.
Q. Although that is a thing of the past, yet there is a certain delicacy that you feel in that respect?
A. Yes.

[fol. 811] Q. Well, I will put it to you in a negative way: Do you think that $690,000 represents the actual value of this boat, the Proteus or the Comus, in August, 1918?

Mr. McGrann: I object to the question as clearly improper, in view of the preceding testimony of this witness.

The Commissioner: Objection overruled. This is cross examination.

The Witness: I would not care to express an opinion without doing some figuring on it.

Q. Well, within limits certainly, Mr. Walker, with a man of your experience, a question like that is susceptible of an answer. I appreciate the delicacy of your position, and I do not wish, in view of what you have said, to press you to give a fixed definite valuation of so much money or so many thousand dollars, but I think it is a fair and reasonable thing for me to ask you whether you think that $690,000 represents approximately her value, or not.

Mr. McGrann: I object on the same grounds.

The Commissioner: Overruled, and Mr. McGrann has an exception.

The Witness: No.

Mr. Burlingham: That is all.

[fol. 812] Redirect examination by Mr. McGrann:

Q. Mr. Walker, who preceded you as Director here in New York?

A. As Federal Manager?

Q. Yes.

A. I was the first.

Q. Was there any one at all that conducted the work which you subsequently took up?

A. Mr. L. J. Spence.

Q. Mr. L. J. Spence?

A. Yes; he was Chairman of the Coastwise Committee, I think it was called.

Q. Did he remain in the Administration after you took charge?

A. No.

Q. He severed his connection at the time you took charge?

A. Yes, sir.

Q. Now, you have answered certain questions on cross examination as to any agreement which may or may not have taken place between the Southern Pacific Company and the Railroad Administration on this particular insured value. You, of course, answered those only in the light of your own knowledge and in so far as you yourself had to do with the whole proceeding, did you?

A. That is all, sir.

Mr. McGrann: That is all.

Recross-examination by Mr. Burlingham:

Q. Would you have known if any such agreement had been made between the owners and the government?

A. I would, so far as my own company was concerned, and whatever was done, it would have been done with the others.

[fol. 813] Q. When you said a moment ago that you did not think that that value of $690,000 approximately represented the true value, may I ask you whether you think it is too low or too high?

Mr. McGrann: Same objection.

The Commissioner: Objection overruled.

Mr. McGrann: Exception.

The Witness: I should think it was low.

Mr. Burlingham: That is all.

Mr. McGrann: That is all I have.

By the Commissioner:

Q. Have you any theory in your mind by means of which you could ascertain the value, if you were called on to do it?

Mr. Burlingham: If you felt free to do so, you mean?

The Commissioner: Yes.

The Witness: Yes, I think so; sir.

Q. What is that theory?

A. Well, I would take the original value, and then I would figure along on just what improvements were made on the ship, and then I would use depreciation, and then consider the value of ships at that time, and perhaps add some appreciation for that.

Q. Suppose you took the cost value in 1900, and depreciated it and [fol. 814] added amounts and then got a particular figure, then you would have to consider the cost at that time?

A. Yes, sir.

Q. Do you know about how much you would multiply that figure? Have you any idea as to that, or have you any knowledge?

A. I have had different figures——

Q. Have you any views based on experience?

A. Yes, I have had figures at different times from ship yards on that.

Q. And that would go from what to what?

A. It runs from two to three.

Q. From two to three times?

A. Yes.

Q. What it would be if the cost had been the same in August, 1918?

A. Yes, sir.

Q. Of course that is all very general?

A. Yes, sir.

Q. But it is simply to get the way you would go at it?

A. Yes.

Mr. McGrann: I do not feel that I can ask this witness anything about that question, but if you are serious, why not ask the depreciation?

The Commissioner: You may, if you like.

Mr. Burlingham: No, he said he would rather have you ask it.

Mr. McGrann: I say, if you are following that line of thought——

The Commissioner: Yes.

Q. Have you in mind a particular method of depreciation that you use?

A. In our line we always used a depreciation of three per cent on [fol. 815] the original cost. Now, some other lines used five per cent on a depreciated cost; that is, taking the original cost and taking it off each year. Some lines used during the war a higher rate of depreciation, because of the inefficiency of your employees.

Q. I suppose that is arbitrary?

A. It is arbitrary all the way through.

Q. But it is as near as you can come?

A. I had a basis for my three per cent; that is the reason I adopted it. I have been criticised quite freely by other steamship companies for having it so low.

The Commissioner: Why do you not tell him what the theory of the Southern Pacific was, and see if he thinks that is fair?

By Mr. Burlingham:

Q. The Southern Pacific Company's method of reckoning depreciation was to count it, I think, at 3¾ per cent for twenty years, so that the value at the end of twenty years would be tweny-five per cent of her original cost, and then they let her stand at that as a scrap value. What do you think of the reasonableness and fairness of such a method?

A. We go on the actual rate throughout the life of the ship, and if you keep on depreciating her at three per cent, she would be gone in 33 1/3 years, under our process.

[fol. 816] The Commissioner: She would not be at all.

Q. But the life of a well built ship—the running life in the coastwise trade, as has been testified here by several witnesses, is about forty years.

A. Yes, you can see many of them forty years and more—the Merchant & Miners, the Clyde and the Mallory.

William C. Rader recalled.

Direct examination by Mr. McGrann:

Q. Mr. Rader, you have already testified in this case?

A. Yes.

Q. In the table which you submitted previously, and which you said was given to you by the Advisory Board for your use, did you take into consideration whether or not the vessel was classified in Lloyds' Register?
A. Yes, sir.

Mr. Burlingham: I object to that. The document must speak for itself. It is not drawn by him. It is something that was handed to him.
Mr. McGrann: I was asking his practice.
[fol. 817] Mr. Burlingham: I object to his practice.
The Commissioner: Read the question.

(Question read by the reporter.)

Mr. Burlingham: I object to that.
The Commissioner: Objection overruled.

Q. What was the difference which you made if any?
A. Subject to a reduction of ten per cent in the insurance accepted.
Q. Take as a specific illustration the Class 5, as to which you testified. What would that value be if the vessel were unclassified?
A. $175 less 10 per cent per ton.

The Commissioner: Was the Comus classified?
Mr. McGrann: It has been testified that the Proteus and the Comus were not classified.
Mr. Burlingham: Nobody has said anything about the Proteus.

Q. Do you know whether or not they were classified?
A. I do not.

Cross-examination by Mr. Burlingham:

Q. What do you mean by your taking into consideration?

[fol. 818] The Commissioner: You mean to say that these figures are reduced by ten per cent if the boats are not classified?
The Witness: Yes.

Q. Mr. McGrann asked you if you took into consideration—what do you mean by taking into consideration?
A. The acceptance of my insurance.

The Commissioner: You could not get your war risk insurance?
The Witness: Yes, sir. I would not accept the insurance. I was the underwriter. I represented the underwriter who was the government.

By Mr. Burlingham:

Q. If you will take a piece of paper and a pencil, I will inform you that the dead weight tonnage of the Comus was 4,000 tons?
A. Yes, sir.
Q. Now, what insurance would you be limited to for war risk on her?

Mr. McGrann: I must object to the figure, if counsel means to be exact.

Mr. Burlingham. It has been testified to by several witnesses.

The Commissioner: Well, assuming that it is the figure.

The Witness: $630,000.

[fol 819] Q. You did accept $690,000 on this boat, did you not?

A. That was subject to approval.

Q. What does that mean?

A. The figures were not received until the insurance was accepted and the risk was over.

The Commissioner: I know, but you told me the other day that that was wholly immaterial, if that boat had been lost before this thing happened.

The Witness: It would have been our misfortune.

The Commissioner: That they could not have recovered the $690,000?

The Witness: Had the risk continued, it was the government's practice, in cases of emergency of this kind, to meet the difference.

The Commissioner: Why was the figure of $690,000 taken originally?

The Witness: It was submitted by the owners as being the fair value.

Mr. Burlingham: You do not know whether it was by the owners, or not, do you?

The Witness: Well, the Railroad Administration.

The Commissioner: Was that submitted by the Railroad Administration as the figure that the owners had insured the boat at for general marine insurance?

The Witness: No, sir.

[fol. 820] The Commissioner: Was it submitted as anything but a figure?

The Witness: An insurance for total loss.

The Commissioner: Did they do anything more than send you the figure?

The Witness: No, sir.

By Mr. Burlingham:

Q. In the document that has been produced—a long list, Exhibit No. 2——

A. Yes, sir; and that was received about December, and the policy covered thirty days from October, I think it was, the 16th.

The Commissioner: Did you receive any communication from the Southern Pacific?

The Commissioner: You dealt wholly with the Railroad Administration?

The Witness: Yes, sir.

By Mr. Burlingham:

Q. And the extent of your dealings with them, so far as this insurance is concerned, was that you received the Exhibit No. 2?

A. Yes, sir; at my request.

Q. And the valuation of the Comus was there stated to be $690,000?

A. Yes, sir.

Q. And this document, Exhibit No. 3 for Identification, I understood you to say was given to you as a means of checking what you [fol. 821] would term the application of the Railroad Administration?

A. Yes, sir.

Q. And these figures that are prepared by Mr. Chubb and Mr. Davey are purely arbitrary figures, are they not?

A. Well, I would not say that.

Q. Well, they do not represent any careful valuation, do they?

A. I think they do.

Q. How can you say that between fifteen and twenty years every boat is worth $175 a dead weight ton, and between ten and fifteen years every boat is worth $180 a dead weight ton? You cannot, with your experience, limited as it is, as regards hulls—you cannot say that that represents even approximately a valuation of a vessel? It is purely conventional and arbitrary, is it not?

A. Yes, applied to the insurance that would be accepted by the Bureau.

Q. But that shows nothing about what the value of the boat is, of course?

A. To the owner, no.

Q. Nor to the Railroad Administration, nor to anybody except the underwriter; is that right?

A. To the underwriter, right.

Mr. Burlingham: That is all.

Redirect examination by Mr. McGrann:

Q. And what is your understanding that this $690,000 covered in the way of insurance?

A. The hull and disbursements.

[fol. 822] Recross-examination by Mr. Burlingham:

Q. There is not such a thing as disbursement insurance against war risk, is there?

A. Yes, sir.

Q. There is?

A. Yes, sir.

Q. You mean insurance on disbursements against a war risk?

A. You can insure freight separately.

Q. Do you really still think that freight and disbursement insurance is the same thing, or anywhere near it?

A. No, sir; but you can insure your incidental expenses.

Q. Is there any way of getting hold of one of these war risk policies that you have been talking about?

A. I thought I had a hull policy. I only have a cargo policy. I have no hull policy.

Mr. McGrann: I was going to put on the record what I have done about that.

Q. Do you mean that the war risk policies that were issued in pursuance of these transactions that you have testified to, covered disbursements?

A. To the best of my knowledge.

Q. What is that knowledge? Seeing the policies?

A. Yes, sir.

Q. When did you see them?

A. I have not seen them in two years.

[fol. 823] By Mr. McGrann:

Q. When did you see them?

A. The last I saw was on January 15, 1919.

Mr. McGrann: I was going to say, on the record, that I have asked the Bureau of War Risk Insurance to send me a certified copy of this particular policy, by number and date. Also, I am going to ask the Railroad Administration to produce the original policy, if they will do so.

The Witness: The Railroad Administration received consideration that private owners would not receive.

The Commissioner: What do you mean by that statement, Mr. McGrann? Would you like to send that in?

Mr. McGrann: I want to have the right still to put in evidence this particular policy.

The Commissioner: That is what I mean. If you get a certified copy, send it over here.

Mr. McGrann: Yes.

Mr. Burlingham: Within about one-sixteenth of a mile of this office now are two men that signed that thing, and either of them knows exactly what the policies are—Mr. Davey and Mr. Chubb. One is at 3 South William Street and the other is at 49 Wall Street.

[fol. 824] At the request of counsel for the petitioner consented to by counsel for the claimant, the following statement is entered upon the record:

"Mr. McGrann: It is requested that there be noted on the record of proceedings in Claim No. 1, that among other claims, the Southern Pacific Company has made claim for the following items in particular:

a. Equipment in commissary department of Proteus	$27,918.05
b. Equipment in deck department of Proteus	9,427.45
c. Equipment in engine department of Proteus	4,284.51
d. Engine stores on board Proteus	679.89
e. Deck stores on board Proteus	436.24
f. Steward's supplies on board Proteus	1,045.30
Total	$43,791.44

It is understood that the foregoing items are to be dealt with separately from Claim No. 1 herein."

April 20, 1922.

It is agreed that the Railroad Administration surrendered control of railroad equipment including the floating equipment on March 1st, 1920.

[fol. 825] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of STANDARD OIL COMPANY (NEW JERSEY), Owner of the Steamship Cushing, for Exemption from or Limitation of Liability

REPORT OF COMMISSIONER

To the Honorable the Judges of the United States District Court for the Southern District of New York:

By an interlocutory decree in the above entitled proceeding, dated and filed on the 30th day of August, 1920, it was referred to me, as Commissioner

"to take such further proofs as may be offered as to the amount, validity and priority of all claims to which objections have been filed, to marshall said claims in accordance with law, and to report thereon with all convenient speed to this Court, together with the evidence taken before him in respect of said claims, and with his [fol. 826] opinion in addition as respects personal injuries, loss of personal effects or other property, and the damages sustained by the owners of the steamship "Proteus" and by the owners of the cargo."

A number of claims were filed and objected to including a claim of the Southern Pacific Company which I have designated as Claim No. 1. This claim was verified on June 28, 1919, and objections thereto, dated July 14, 1919, were filed on July 15, 1919, and again on December 5 1919. The following items of damage are claimed:

"(a) For loss of the steamship Proteus, and her equipment, personal effects of passengers and crew, personal injuries and loss of life, cargo and other incidental expenses, estimated	$3,000,000.
(b) For damages claimed in the suit filed by Roberts, Carter & Company against SS. Cushing, for loss of cargo	180,000.
(c) For damages claimed in the action brought in the New York Supreme Court, New York County, by Delores Francis, Plaintiff, [fol. 827] against Director General of Railroads of the United States (Southern Pacific Company)	15,000.

(d) For damages claimed in the libel filed in the United States District Court for the Southern District of New York by Bonita Hearn, libellant, against Southern Pacific Lines and Standard Oil Company of New Jersey.	5,000.
(e) For damages claimed in action brought in the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, by Jacob J. Luvell et al., plaintiffs, against Director General of Railroads.....	162.96
	$3,200,162.96"

A separate claim for the foregoing item marked "C" was filed by the claimant Delores Francis, verified June 28, 1919, and separate objections thereto, dated July 14, 1919, were filed on July 15, 1919, and again on December 5, 1919. I have designated this separate claim as Claim No. 2.

[fol. 828] A separate claim for the foregoing item marked "d" was filed by the claimant Bonita Hearn, verified April 12, 1919, and separate objections thereto, dated July 14, 1919, were filed on July 15, 1919, and again on December 5, 1919. I have designated this separate claim as Claim No. 3.

A separate claim for the foregoing item marked "b" was filed by the claimants Roberts, Carter & Company, verified May 27, 1919, and the same was amended by an order of this Court, dated and filed April 27, 1921. I have designated this separate claim as Claim No. 4.

Objections by the Southern Pacific Company, dated July 3, 1919, to a number of claims, including the three foregoing separate claims Nos. 2, 3 and 4, were filed on July 12, 1919.

The foregoing item marked "e" on the claim of the Southern Pacific Company was withdrawn by Messrs. Burlingham, Veeder, Master & Fearey, Proctors for said company, by a letter addressed to me, dated October 27, 1921, and filed with me on October 29, 1921. The said letter is annexed hereto and is hereby made a part of this report.

The claims involving the foregoing items "b," "c," and "d" were brought on for hearing before me by the several claimants independently, and the Southern Pacific Company undertook to prove item "a" of its claim only, under which it claimed damages in the sum of $3,000,000 "for loss of the steamship Proteus, and her equipment * * *" Claim No. 1, then, upon which this report [fol. 829] is made, deals only with that item.

The said claim was duly brought on for hearing before me and I was attended by

Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Standard Oil Company of New Jersey, by Mr. W. H. McGrann, of Counsel.

Messrs. Burlingham, Veeder, Masten & Fearey, Proctors for South-

ern Pacific Company, and other claimants, by Mr. C. C. Burlingham and Mr. A. H. Neeley, of counsel.

Messrs. Harrington Bigham & Englar, Proctors for Cargo interests, by Mr. Corning G. McKennee, of counsel.

Mr. Henry O. Falk, Proctor for Bonita Hearn.

Messrs. Cohen Brothers, Proctors for Dolores Francis, by Mr. F. Whitlock Newman, of counsel.

Mr. Frank M. Patterson, Proctor for Lucy Manufacturing Company, by Mr. D. C. Mellen, of counsel.

I proceeded to take the evidence offered by the parties and having considered the same and the arguments and briefs of counsel thereon, do hereby respectfully report as follows:

[fol. 830] The Proteus was a steel passenger and freight steamship equipped with triple expansion engines and Scotch boilers. Her speed was 15 knots and her dimensions were, length 405 feet over all, 390 feet between perpendiculars, 48 feet beam and 32 feet, 9 inches depth. Her tonnage was 3,006 tons net, 4,836 tons gross and about 4,000 tons deadweight. She was built in 1900 by the Newport News Shipbuilding Company for use in the Southern Pacific Company's service between New York and New Orleans and was used in this service by her owner until the end of December, 1917, when she was taken over by the Government under a proclamation of the President dated the 26th of that month. After that time she was continued in the same service under the direction and control of the United States Railroad Administration. The "rights and obligations of the parties" under this "Federal control" are set forth in an "Agreement Between The Director General of Railroads and the Southern Pacific Company and other Corporations" which is in evidence as Petitioner's Exhibit I. Under this agreement the Director General was bound to return the ship to the owner "at the end of Federal control in substantially as good repair and in substantially as complete equipment as it was on January 1, 1918," and if the ship were destroyed otherwise than by fire or public enemies, was bound to reimburse the owner in "the value" of the ship (Sec. 5, e).

On August 19, 1918, a collision occurred between the Proteus, [fol. 831] operated by the Director General of Railroads, and the Cushing, a steamship about to be taken over by the Government but owned and operated at that time by the petitioner in this proceeding, which resulted in the total loss of the Proteus. The claim for this loss is filed by the Southern Pacific Company, as owner, but the Director General of Railroads is a party to the proceeding and has appeared therein (S. M., 18) although he offered no evidence independently of that offered by the claimant.

There are many cases in which the Courts have considered the rules to be applied in determining the value of a ship that has been lost.

In The Baltimore, 75 U. S. 377, Mr. Justice Clifford said at p. 386:

"Restitution or compensation is the rule in all cases where repairs are practicable, but if the vessel of the libellant is totally lost, the

rule of damages is the market value of the vessel (if the vessel is of a class which has such value) at the time of her destruction."

All of the cases agree that if a ship may be said to have had a market value, that value must be taken and that other methods of proof may be resorted to only where the ship was one for which there was no market. The general question and possible methods of proof are discussed at length in The Colorado, Fed. case No. 3029, where the views of Dr. Lushington, as expressed in the case of The [fol. 832] Clyde, Swab. 24, are quoted, and in Alaska S. S. Co. v. Inland Navigation Co., C. C. A., 9th Circuit, 211 Fed. 840. In La Normandie, 58 Fed. 427, the Court of Appeals in this circuit, after finding that there was no market for a certain pilot boat, said by Judge Lacombe:

"In such cases there is no hard and fast rule prescribing the method in which the actual value shall be computed. It is always a difficult question to decide * * *."

While the Proteus belonged to a class for which there is a market in normal times, she was under requisition by the Government and could not have been sold in August, 1918. The market for all such ships was closed during the War and in August, 1918, the Proteus had no market value. It was thus open to and incumbent upon the claimant to adopt some other method of proof. I have been referred to no case and have fund no case which is analogus in its facts to the case at bar, but two methods that have been sanctioned in cases where, for other reasons, a market value could not be shown are, respectively, proof of the value of the vessel as "a going concern," and proof of what it would have cost to reproduce the vessel at the time she was lost with a deduction from that amount for depreciation.

The claimant adopted the latter method and bases its case principally upon the testimony of experts with respect to what, in their [fol. 833] opinion, it would have cost to reproduce the Proteus in August, 1918, and with respect to the amount that should be deducted from such estimated cost for depreciation during the 18 years that the ship had been in use. The petitioner undertook to meet the case thus made by the testimony of other experts, and the result is that the claimant, in reliance upon the witnesses called by it, closes its brief with the assertion "that on the proofs the value of the Proteus on August 19, 1918, was at least $1,225,000" and the petitioner, in reliance upon the witnesses called by it, closes its brief with the assertion "that a preponderance of the evidence establishes that a valuation of the Proteus as of August 19, 1918, in the sum of $600,000 would be a liberal one" and that "an allowance of even less than $500,000 would be ample, and would fulfill the standard of restitutio in integrum." The claimant's experts think the ship was worth more than twice as much as the petitioner's experts think she was worth and the parties are accordingly more than $600,00 apart in their claims.

The claimant's method of proof which starts with finding the replacement value in August, 1918, seems to me objectionable because of the fact that the vessel could not have been replaced at that time. The estimated cost was based on the high prices of labor and materials then prevailing and on the assumption that such a ship as the Proteus could have been built for a private owner at that time. The Vice-President of the Newport News Shipbuilding and [fol. 834] Drydock Company, which built the Proteus in 1900, testified for the claimant with respect to what it would have cost to build her in 1918, at the then prices, and conceded on cross examination that his company could not have done the work "because our plant was entirely under the control of the Government as to its output" (S. M. 211); and such was the case generally. The high prices then prevailing were due to the war. The fact that the ship could not have been built for a private owner was due to the War, and it would seem to me, therefore, that if we took those prices as a basis from which to ascertain the value of the ship, we would be adopting a purely artificial standard.

In addition to this I think the claimant has erred in failing to give effect to the fact that at the time of the loss the ship was under requisition. It is, of course, entitled to be put, to the fullest extent possible, in the same position pecuniarily that it would have been in if the loss had not occurred, but what is that position? At the time of the loss the claimant was not only unable to sell the ship but was barred by law from using or disposing of her in any way. It had no control over her at all and had she not been lost would have received only what the Government would have paid for her use until such time as she would have been returned. She would have been returned on March 1, 1920 (S. M., 52, 321), and after that time the market was open and the ship would have had a market value. It would seem to me, therefore, that the way to [fol. 835] reimburse the claimant would be to allow the amount the ship would have earned while under Federal control and the amount for which she could have been sold within a reasonable time after the market opened. The proof, however, does not admit of the application of this theory. It was suggested to counsel toward the close of the trial before me when the difficulty of making a satisfactory finding on the evidence that had been introduced was under discussion (S. M., 243, 244), but the claimant elected to stand upon the proof it had made on the theory of replacement value and argued that the witnesses on both sides had "adopted the same method" and that it was a "fair one to adopt" (S. M., 251). The petitioner's counsel hesitated "to concede that on the record" (S. M., 256) a replacement value might be found and said his expert testimony was not offered "solely" with a view to establishing "the value of the Proteus" but was "offered in rebuttal of what the witnesses for the Proteus have testified to" (S. M., 254). He did urge, however, that in the absence of a market value no other method should be followed exclusively and that the evidence was sufficient to call for a finding of what would be "a fair compensation" (S. M., 257) to the claimant, not to exceed the sum of $600,000.

It is true, of course, that we are not obliged to apply any particular theory and that all of the evidence offered must be considered to ascertain whether on the whole case it is possible to determine [fol. 836] the claimant's actual pecuniary loss with any reasonable degree of certainty.

The claimant examined Frank S. Martin, Alfred G. Smith, Amos S. Hebble, Harry H. Raymond and Frederick P. Palen.

Mr. Martin is a marine engineer, naval architect and appraiser and during the war was a member of the Ocean Advisory Board on Just Compensation, which advised the Shipping Board as to the values of vessels that had been lost. He "took the estimated cost of reproducing a vessel of the same size and description as the Proteus in August, 1918" (S. M. 10) at $1,750,000, deducted therefrom $525,000 for depreciation at 2½% for the 18 years, and the difference of $1,225,000 was in his opinion the value of the vessel at the time she was lost. In normal times he would have deducted 5% for depreciation, but because of the War, thought half that amount sufficient. In this connection it is to be noted that depreciation is supposed to represent ordinary wear and tear and that the replacement value was fixed at War prices. It would seem, therefore, that full effect was given to the War in fixing the value to be depreciated and that the normal depreciation (assuming it to be something that can be determined by a general rule) should not be changed. The Proteus was maintained in first class condition but the actual wear and tear during War conditions was certainly not less than during normal conditions, although there is evidence that the ship was not [fol. 837] operated "more strenuously after the Railroad Administration took charge" (S. M. 46).

Mr. Palen is Vice President of the Newport News Shipbuilding and Drydock Company, which built the Proteus in 1900. He testified that if the vessel could have be built in 1918, at the prices for labor and materials prevailing in August of that year she would have cost the owner $1,755,450. The detailed figures appear on page 213 of the minutes. He knew that depreciation at different rates varying from 2½% to 5% was charged off by owners on their books and considered this a matter of business policy rather than as representing "the actual physical change." (S. M. 204).

Mr. Hebble who has been the claimant's superintending engineer since 1907, testified that the original cost of the Proteus in 1900 was $557,600 and that she was re-boilered and otherwise improved in 1909, at a cost of $90,000, and these figures are not disputed. He also testified that the ship was maintained at a high standard, that he kept himself advised of the cost of vessels generally, that in August, 1918, the cost of vessels like the Proteus was about $380 a ton and that the cost of reproducing the vessel at that time would accordingly have been about $1,750,000. He thought the cost of construction had increased about three fold between 1900 and 1918.

Mr. Raymond, President of the Clyde and Mallory Lines and of the American Steamship Association, valued the Proteus at the time [fol. 838] of her loss at $1,297,635. When asked to state how he

reached this figure, he said: "I made inquiry if they had asked for her replacement value and I was given the replacement value at one million seven hundred and fifty thousand dollars and I made my valuation from that" (S. M. 69). In making his deduction for depreciation he "used five per cent and then gave them credit for being fifty per cent. better than the other fellow" (S. M. 75) which amounted to allowing about 2½%. He then added $75,000 to cover superintendent's and designer's fees and thus reached the sum of $1,297,635, which he gave as the value of the ship. When asked about "the rule of depreciation if there is any" he said "there is not any rule * * * Everybody does it differently" and that its purpose was "to help in taxes" (S. M. 69).

Mr. Smith, who is manager of the New York and Cuba Mail Steamship Company, based his opinion upon his knowledge of what had happened in the case of two steamships belonging to that line, the Havana and the Saratoga. They were built in 1906 and had a gross tonnage of 6,400 tons each. In 1917, when the Government was about to take over these ships and he was "seeking to get at a price" he asked the Cramps how much it would cost to duplicate them at that time "and their estimate was a little over $3,000,000 for each vessel" (S. M. 26). Allowing for the differences in age tonnage, passenger capacity, speed and equipment he concluded that the Proteus was worth two-thirds of the value of the Havana [fol. 839] and that if it would cost $3,000,000 to reproduce the Havana it would cost $2,000,000 to reproduce the Proteus (S. M. 27). He then allowed a depreciation of something over $600,000 and obtained a value of about $1,350,000. He thought that a fair depreciation would vary from 2 to 10% according to the care taken of the vessel and that in view of the way the claimant's vessels were maintained, of "roughly speaking" (S. M. 30) would be fair in the case of its vessels.

The foregoing was his opinion based on the supposed cost of reproduction but he reached the same result in another way. The Havana was built in 1906 and he took her cost at $900,000. She was actually appraised by the Government Board of Appraisers in 1917 and taken over at the sum of $2,240,000. The Proteus cost in the neighborhood of $600,000 and would thus be worth about $1,500,000, less an allowance for the difference in ages. He then allowed $150,000 for this difference and "arrived at a figure of $1,350,000 as the fair market value of that ship" (S. M. 27). He was not undertaking to be exact and said: "these are all approximate figures, of course."

It is interesting to compare the testimony of this witness, based on the Government appraisals of the Havana and the Saratoga with that of the petitioner's witness, Horatio D. Gillmor, who was a member of the Board that made the appraisal. Mr. Smith took the original cost of the Havana to be $900,000 and used that figure as a [fol. 840] basis of comparison, whereas Captain Gillmor testified that the contract price was about $950,000, and that with betterments subsequently added the total cost came to about $1,183,000

or $1,134,000" (S. M. 150). As to the value of the Proteus he thought that $650,000 "would be an outside value * * *, as of August, 1918" (S. M. 121) and in referring to the allowance of $2,240,000 for the Havana in 1917 said: "That is entirely consistent with $650,000 for this one" (S. M. 150). As a member of the Joint Merchant Vessel Board organized to make "surveys of everything flying the American flag" (S. M. 115) he had personally inspected and placed a value on the Proteus in 1916. The market for such vessels was then free and he fixed $625,000 as "a fair value and one at which the United States should be able to acquire the vessel under the conditions existing at that time" (S. M. 121, 122). Considering this appraisal in the light of subsequent changes in conditions and of the conditions existing in August, 1918, he concluded that the vessel was not worth more than $650,000 at that in August, 1918, less the allowance for depreciation called for by the "Stevenson Taylor table" which the Board of appraisal used. He thought the cost of reproduction would be "two and one-half times her first cost" (S. M. 129) and consulted, among other things, the statistics of the Department of Labor with respect to the cost of ma-
[fol. 841] terials, before reaching this conclusion. When asked by the claimant's counsel whether it would not be more satisfactory "to ascertain from a shipyard how much it would cost to reproduce her" he agreed that it would, provided "you could get the real figure from the shipyard" (S. M. 131). They could build for the United States only at the time and he thought that any estimates given to a private owner would be excessive. He said, referring to the Board of which he was a member: "We found it necessary to discount the statements that builders presented to us" (S. M. 131). So he stood by his estimate of two and a half times the original cost, allowed for the improvements, and after deducting for depreciation by the Stevenson Taylor Table reached the figure $693,000. This amount, however, he thought too high and from his knowledge of the vessel was of the opinion that its value did not exceed $650,000 in August, 1918. He thought she would have been worth less in the summer of 1919 and would not have brought more than $180 a ton in any port in the United States at that time.

The "Stevenson Taylor table" was prepared as a means of determining how much should be allowed for the depreciation of "steel, ocean going vessels" (S. M. 163). It was presented to the Board of Appraisal upon its organization by Mr. Stevenson Taylor, who was a member of the Board, and was accepted and used by the Board in the course of its work of ascertaining "the just compensation to be
[fol. 842] paid for such vessels as might be or have been taken by the Navy Department under the authority of the President" (S. M. 116, 117). According to that table the depreciation of "an eighteen-year-old steel vessel which had been well maintained" would be .452 of her first cost (S. M. 124, 184).

Mr. Robert W. Morrell, a mechanical engineer and naval architect, also testified on behalf of the petitioner. He had been in the employ of the Newport News Shipbuilding Company for five

years and was then with the Standard Oil Company of New Jersey in charge of the designing and construction of all vessels built for that company. He had studied the facts in regard to the Proteus and was of the opinion that her value in August, 1918, was $630,000 (S. M. 97). In estimating what it would have cost to reproduce the vessel at that time he "assumed that the cost of construction had increased as a maximum about three times" (S. M. 104). His company "uses a depreciation of five per cent on the original first cost" for the first sixteen years and of two and a half per cent. for the following four years. Because of the War he depreciated his estimate of the cost of reproduction at four per cent. for the first fourteen years and at two and a half per cent. for the remaining four years and reached the figure of $630,000 in this way. Had five per cent. been used, the resulting figure would have been $564,000.

It may be noted as bearing on the value of all of this evidence [fol. 843] that Mr. Forrel took the cost of reproduction at three times the first cost and reached a conclusion that the vessel was worth less than Captain Gillmor, who took the cost of reproduction at two and a half times the first cost, thought it was worth. This is due to the different methods of depreciation and who shall say which method is correct or whether either method is correct?

The third expert called by the petitioner was Albert Loring Swasey, a naval architect and Vice President of the Herreshoff Manufacturing Company. He was a member of various Government Boards during the war, including the Board of Appraisal which appraised the Havana and the Saratoga. He agreed with Captain Gillmor that the cost of reproduction in August, 1918 should be taken at two and a half times the original cost and that the Stevenson Taylor table should be used to determine the amount to be deducted for depreciation. With these standards and allowing for the improvement, he reached the conclusion that the value of the vessel was $611,000. With the same standards to start with, Captain Gillmor found $693,000. His method of figuring appears on pages 158 and 159 and Mr. Swasey's method appears on page 174 of the minutes. Mr. Swasey was on the Board of Appraisal when it appraised the Havana and the Saratoga and says "the same principles" (S. M. 185) were used in appraising those vessels. The claimant's counsel asked him whether he thought it was "a fair method of get- [fol. 844] ting at the value of a vessel during the War to ascertain how much it would cost fairly to build a vessel like the one in question, and depreciate it according to an established method" and he said he thought it was. He thought that while the builders would have given out higher figures, they would, nevertheless, have reproduced the Proteus in 1918 for two and a half times her first cost (S. M. 191, 192) had they been allowed to do so by the Government. The "established method" of depreciation, for him, was the Stevenson Taylor table and its application resulted in the figure $611,000, which he said was the "maximum figure" at which the vessel should be appraised. This was an "appraised value" as of August, 1918, and was independent of market value at any time (S. M. 193).

It appears further that the Comus which was a sister ship of the Proteus, built at the same time and having the same value, had been insured by the claimant for $600,000 and that prior to the time its ships were taken over by the Government it increased this insurance to $690,000. The amount covered "hull and disbursements," and after the Railroad Administration took possession, it insured the vessel for its own protection at the same amount without making any independent investigation into its actual value. The claimant objected to this evidence, citing Union Pacific R. R. Co. v. Lucas, 136 Fed. 374, in which the Court of Appeals in the Eighth Circuit excluded evidence of the amount for which certain buildings were in-
[fol. 845] sured as not tending to show their value. In The Colorado, however, Fed. Case No. 3029, the value of a vessel was involved and the Court in Michigan quoted with approval what was said by Dr. Lushington in the case of The Clyde, Swab. 24. Among the many circumstances that Dr. Lushington said might be considered in determining the value of a vessel was "the sum at which she was insured" although he regarded this as among the circumstances having "a slighter bearing" on the case. It would seem to me that the objection goes to the weight and that the evidence is properly on the record to be considered in the light of all the facts and circumstances.

It also appears that the value at which the Proteus was carried on the claimant's books was $224,986.49 and that this sum represented the actual cost less three and three quarters per cent for depreciation during the eighteen years. This evidence, too, was received over the claimant's objection. The fact that no appreciation of the vessel over its cost, due to increased market value or increased cost of labor and materials as reflected in the books, may render the book value immaterial on the question of actual value, but the books show the claimant's method of determining depreciation, and as proof of the correct method is necessarily involved in the theory upon which the claimant relies to prove value, I think the evidence, with the explanation of what it represents, is properly in the record.
[fol. 846] The foregoing are the reasons for receiving evidence of the insurance and of what the claimant's books show but the conclusion that I have reached on the whole case would not be affected if all such evidence were stricken out.

Since the close of the case the claimant's counsel have referred me to the case of In re Arbitration between the Mersey Docks & Harbor Board and Lords Commissioners of the Admiralty, Vol. 3, Kings Bench Division, 1920, p. 223, as throwing "some light on the question of damages" in the case at bar. That case was a proceeding to determine the compensation that should be paid to the Board because of the fact that it had not received a certain barge for which it had contracted in 1914 and which it would have received from the builders in 1917 had it not been, in the meantime, requisitioned by the Admiralty. It appeared that owing to the War the Board could not have replaced the barge by another new one for three years, that is, until 1920, and that it would cost about

three times as much as the one contracted for in 1914. It was held that the Board was entitled to have the barge "replaced" by the Admiralty and the Court by The Lord Chief Justice, said:

"As it cannot be replaced by the expenditure of money they are entitled to the amount of money which will represent the cost to [fol. 847] them of the replacement. That must be measured with regard to the special circumstances arising from the War, and more especially to the increase in the value of labour and materials which has continued up to the present time."

In that case the cost of the new barge in 1920 had been ascertained and the only question was with respect to the rule of damages. In the case at bar we are dealing with a ship that had been in use for eighteen years. We do not know what it would have cost to replace her when she could have been replaced and the case cited is of no assistance in determining the questions of fact that are presented in the case at bar. The difficulty here is in the nature of the evidence and in the extent of the difference between the expert witnesses.

If the methods by means of which the experts formed their opinions are permissible, they were all competent to testify, but the views of three experts on each side are practically the same, they were equally frank and honest in giving their views, and the two group are over $600,000 apart.

I must consider all of the opinions, having in mind the standpoints from which they were given and all of the facts and circumstances. The result of such consideration is that the views of the petitioner's witnesses seem to me more nearly in accord with the probabilities in the case at bar than those of claimant's witnesses but it is difficult to make any satisfactory finding of fact.

[fol. 848] I do not feel called upon to find an exact replacement value or a particular method of depreciation that would disclose the exact amount that should be deducted for wear and tear during a period of eighteen years. Nor do I feel called upon to adopt any particular theory under which, by means of mathematical calculations, a final figure would be produced that should be accepted as exact and conclusive; and if, upon the record, I must make a finding, I can do no more than find that sum which, after a consideration of the whole case in the light of all of its facts and circumstances, would seem to be sufficient to compensate the claimant for its loss. In The Utopia, 16 Fed. 507, Judge Brown affirmed the report of a Commissioner who said at page 510:

"I do not consider it imperative to adopt the judgment or opinion of any one of the witnesses, or any two or more, but, weighing the whole testimony, in all its parts, I feel justified in reaching a conclusion which a jury would entertain after hearing all the facts and circumstances."

Approaching the question in this way and considering the whole case, I conclude that the damages to be awarded to the claimant on

account of the loss of the ship should be the sum of $750,000, with interest thereon from August 19, 1918, the date of the loss.

This finding is exclusive of the items of equipment that appear in [fol. 849] the statement of counsel on page 320 of the minutes and that the parties agreed to treat separately, as appears from said statement.

I sumbit and file herewith the minutes of all testimony taken before me, covering 321 typewritten pages and the exhibits.

Dated, New York, April 21, 1922.

Respectfully submitted,
(Sgd.) Edwards H. Childs, Commissioner.

[fol. 850] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of STANDARD OIL COMPANY (N. J.), Owner of S. S. Cushing, for Limitation of Liability

EXCEPTIONS OF SOUTHERN PACIFIC COMPANY TO REPORT OF COMMISSIONER

Southern Pacific Company, claimant herein excepts to the report of the Commissioner, Edwards H. Childs, Esq., filed herein April 22, 1922, on the following grounds:

1. In that he finds the value of the steamship Proteus as of August 19, 1918, to have been $750,000, whereas the proofs show that she was worth at that time at least $1,225,000.

2. In that he finds that the cost of reproduction with an allowance for depreciation for a period of 18 years is not a correct method of determining the value of the Proteus.

3. In that in determining the value of the Proteus, he applied no principle of law as to the measure of damages.

[fol. 851] 4. In that he improperly admitted in evidence the amount for which the S. S. Comus was insured.

5. In that he improperly admitted in evidence the book value of the Proteus as it appeared on the claimant's books.

Burlingham, Veeder, Masten & Fearey, Proctors for Claimant.

To Edwards H. Childs, Esq., Commissioner, 59 Wall Street, New York City; Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for S. S. Cushing, 27 William Street, New York City; Clerk of the United States District Court, Southern District of New York.

[fol. 852] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of STANDARD OIL COMPANY (N. J.), Owner of S. S. Cushing for Exemption from or Limitation of Liability

EXCEPTIONS OF STANDARD OIL COMPANY (N. J.) TO REPORT OF COMMISSIONER

The Petitioner, Standard Oil Company (New Jersey) excepts to the report and finding of the Commissioner, Edwards H. Childs, Esq., filed herein, April 22, 1922, in that the allowance to the claimant of $750,000, with interest thereon from August 19, 1918, for loss of the Proteus is excessive and, an allowance of not more than $500,000, would be ample.

Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Petitioner.

[fol. 853] To Edwards H. Childs, Esq., Commissioner, 59 Wall Street, New York City; Burlingham, Veeder, Masten & Fearey, Proctors for Claimant, 27 William Street, New York City; Alex. Gilchrist, Jr., Clerk of the United States District Court, Southern District of New York.

[fol. 854] IN UNITED STATES DISTRICT COURT

OPINION, MACK, C. J., ON EXCEPTIONS TO REPORT OF COMMISSIONER

MACK, Circuit Judge;

The question at issue is the value of the steamship Proteus, which was sunk on August 19, 1918, in a collision with the steamship Cushing owned by the Standard Oil Company of New Jersey. The Proteus was owned by the Southern Pacific Company and was under requisition to the Director-General of Railroads. The Commissioner fixed the value of the Proteus at $750,000. Both parties have objected to his finding, the Southern Pacific Company as too low, the Standard Oil Company as too high.

In August, 1918, practically all American ships of the size and type of the Proteus were under requisition, and the market for all such ships was for all substantial purposes closed during the war. It is, however, a matter of common knowledge that during 1917 and 1918 there was what might be termed a "time monopoly" in ships. The submarines were taking their toll without stint, and ships could not be built fast enough to supply the Allies' needs. Ships which happened to be free from requisition (The American requisitioning policy did not become general as to ships in the course of construction until August, 1917, and as to ships afloat until October, 1917) were able to make huge monopoly profits from a single voyage. The [fol. 855] so-called market value of ships soared, even out of pro-

portion to the cost of construction of new ships, although this too had also increased abnormally, on account of the unprecedented demands and the comparative shortage of shipbuilding facilities. While the market price may be the fairest test of the value of standard commodities commonly bought and sold, when the normal conditions of free competition have full play, this test obviously fails not only if there is no market but when the conditions which make the test a proper one do not obtain. Prior to the intervention of the Government, private ship owners may have been entirely justified in exacting from private shippers all the traffic would bear, since under the conditions prevailing a reduction in freights would not necessarily have inured to the benefit of the public here or abroad, but rather to the shippers fortunate enough to obtain shipping space. It would seem to me clear, however, that the ship owners had no vested right to earn profits from the war necessities, and that such market as prevailed just prior to the requisitioning was no necessary test of the fair value under the circumstances of a ship purchased or used by the government under its requisitioning powers. Cf. City of New York v. Sage, 239 U. S., 57, 61; Lawrence v. Boston, 119 Mass., 126, 128; Lanquist v. Chicago, 200 Ill., 69, 73; Brown v. Calumet River [fol. 856] Railway Co., 125 Ill., 600, 606; U. S. v. Inlots, 26 Fed. Cases, 15, 441. It is not necessary to consider here what would be fair value under the circumstances between private litigants if the steamship Proteus had not been under requisition. The Proteus was under requisition, and the ascertainment of her value must be predicated on that fact. Kia Ora, 246 Fed., 143; Harries v. Shipping Controller, 14 Aspinall M. C., 320.

While, as above stated, under normal conditions the market price of standard commodities might be taken as the exclusive test of value, it is fair value under the circumstances, rather than market price, which is the ultimate criterion. If evidence is adduced, indicating that the market price is not fair under the circumstances, then all other relevant facts should likewise be considered in determining fair value, unless indeed some positive form for ascertaining value is established by legislation. Cf. the rate regulation cases; Minnesota Rate Cases, 230 U. S., 352, 434.

All the relevant facts should be considered. The cost of reproduction less depreciation has been commonly adopted as a standard for rate making purposes. Knoxville v. Knoxville Water Co., 212 U. S., 1; Denver v. Denver Union Water Co., 246 U. S., 178. But there are difficulties of theory and practice in the application of the standard, Whitten, 27 Harvard Law Review, 419; Henderson, 33 Harvard Law Review, 1031; and the rule has been limited in important re- [fol. 857] spects; Des Moines Gas Co. v. Des Moines, 238 U. S., 153, 171, 172; Minnesota Rate Cases, 230 U. S., 352, 452.

Recently there has been a tendency among legal and economic writers to bring to the fore the prudent investment standard (Richberg, 31 Yale Law Journal, 263, 266, 279; Hale, 30 Yale Law Journal, 710, 720; Henderson, supra; Whitten, supra; Friday, 36

Quarterly Journal of Economics, 197, 211; Scharfman, The American Railway Problem, Ch. 8, sec. 4) which has not been unnoticed by the U. S. Supreme Court. Galveston Electric Co. v. Galveston, decided April 10, 1922.

While it would seem that fair value would not generally exceed the estimated cost of reproduction less depreciation, and under normal conditions of free competition the cost of reproduction less depreciation should approximate fair value, reproduction cost, no more than market value, should necessarily be regarded as the ultimate criterion of fair value. In 1918 the cost of reproduction no less than market price was affected by the temporary national necessities. Time was the essence of real governmental economy in prosecuting the war; the Government could afford to pay more for labor and more for material and for all else if only the ships could be built. The shipyards were closed for building for private account from August 1917 until after the end of the war. It appears that costs of production [fol. 858] increased not inconsiderably during this interval and such costs were riding toward their peak in August, 1918, although the actual peak seems to have been reached a few months later. There is evidence that the market declined after the war, but the extent and character of the decline were not clearly explained. It seems to me plain that the increase in the cost of reproduction after the Government took over control of the shipyards and closed them for building for private account, is to be ascribed practically solely to war conditions, and that such increase should not be regarded as affecting the value of ships under requisition. If it did, the Government should have increased the requisition rates with every bonus or inducement it was willing to offer to the shipyards or their men to speed up their production in the great national emergency.

It would seem therefore proper, in finding the fair value of the Proteus in August, 1918, to discount the then cost of reproduction. There were undoubtedly increases over the pre-war (1914) values, which should not be discounted or regarded as purely speculative. The evidence in this case is not complete enough to warrant broad generalizations. Doubtless the fair value of requisitioned ships during the war was higher than similar ships were worth after the war; and if destroyed during the war, the latter value would not be a fair measure of compensation. But on the other hand, the national necessities and the consequent cost of new ships built during the war [fol. 859] to meet them furnish no fair test for compensation or requisitioning vessels lost or destroyed during the war. In the rate-regulating cases war values are discounted in arriving at a fair estimate of the cost of reproduction. Galveston Electric Co. v. Galveston, supra.

Witnesses for the Proteus have estimated that it would cost in August, 1918, about $1,750,000 to reproduce her as a new ship. The items making up this estimate seem throughout to have been calculated on a fairly liberal basis with no discount for any war costs. It is argued that no more than $525,000 should be taken off for depreciation, because while under normal conditions the allowance

for depreciation would be increased, "during the war, when vessel property was very valuable, the appreciation more than made up for the depreciation." But as the learned Commissioner pointed out, if full effect is given to the war in fixing the reproduction value, the normal rate of depreciation ought not to be changed. Even if $1,750,000 were taken as the value of the Proteus if new, as a ship which had seen service for eighteen years, she would not be worth more than $791,000, if depreciation were allowed on the basis of the rather conservative depreciation table prepared by Mr. Stevenson Taylor of the American Bureau of Shipping for the use of the Naval Board of Appraisal, of which he was a member. According to this table, an eighteen-year old ship is worth .452 of her original cost. [fol. 860] The petitioner's witnesses, on the other hand, estimated the cost of reproduction of the Proteus in August, 1918, to be not in excess of $1,400,000. If depreciation were deducted from this amount according to the "Stevenson Taylor table," the value of the Proteus would be about $633,000. Captain Gillmoor, who seems to have given considerable thought to the question of ship values, testified that $650,000 "would be an outside value * * * as of August, 1918." Even if the petitioner's witnesses were somewhat low in their estimates of the costs prevailing in August, 1918, these costs, unless discounted, would, as has been observed, include abnormal war charges to some extent.

The Comus, a sister ship of the Proteus was insured with the Bureau of War Risk Insurance for $690,000. This seems to have been in excess of the maximum value for which the Bureau would ordinarily insure under the scale of valuation formulated on August 26, 1918, through its Advisory Board, on which sat some of the best marine insurance men in the country. While the Board undoubtedly had in mind the interest of the Government in formulating its valuations, the scale was also designed to afford fair if not liberal protection to American ship owners. The scale might, on the one hand, be thought to be a little unfair as a measure of the fair value of a passenger ship. On the other hand, only twelve and one-half per cent. of the value allowed for a new ship had to be deducted as [fol. 861] depreciation for an eighteen-year old ship, which provision would indicate that the legitimate interests of the owner of a ship like the Proteus could not be said to have been slighted or overlooked.

While overruling the exceptions of the claimant as to the admission in evidence of the amount for which the Comus was insured and the book value of the Proteus, it is to be noted that the Commissioner has stated that, disregarding this evidence, the result would be unchanged. The Court, too, has reached the same conclusion. Each and all of the exceptions of the claimant are overruled.

I have had greater doubt as to the petitioner's exception that the allowance of $750,000, with interest from August 19, 1918, is excessive. But for one fact, I should have reached the conclusion that on the entire record it should be reduced by $75,000 to $100,000. I am of the opinion, however, that the Stevenson Taylor depreciation

table is not to be arbitrarily applied in a case of this kind, and that consideration is to be given to the actual upkeep of the vessel in question in determining the percentage of depreciation. The evidence satisfies me that this vessel, like the other vessels of the claimant, was excellently maintained, and that giving due effect to this consideration, the result reached by the Commissioner would seem to afford full and ample compensation. The exception, therefore, of [fol. 862] the petitioner will likewise be overruled and the amount fixed by the Commissioner, $750,000, with interest from the date of the loss, will be confirmed.

The claimant and the Director-General, I assume, have come or will come to an agreement regarding their respective rights as to the interest accruing during the period of requisition. Unless some agreement has been reached, I assume that the Government is entitled to the interest during the period of requisition, and the claimant to its agreed compensation.

October 17, 1922.

[fol. 863] In the Matter of the Petition of the STANDARD OIL COMPANY OF NEW JERSEY, as owner of the Steamship Cushing, for Limitation of Liability.

Consolidated Cause

ORDER CONSOLIDATING CAUSES

Upon the subjoined consent and on motion of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for the petitioner Standard Oil Company, it is

Ordered that the consolidated cause consisting of the following cases:

In the Matter of the petition of the STANDARD OIL COMPANY OF NEW JERSEY, as Owner of the Steamship Cushing, for Limitation of Liability,

[fol. 864] and

In the Matter of the Petition of SOUTHERN PACIFIC COMPANY, as Owner of the Steamship Proteus, for Limitation of Liability, Consolidated by Order of This Court Entered on the 6th Day of November, 1922,

Be and the same hereby is entitled as follows:

In the Matter of the Petition of STANDARD OIL COMPANY OF NEW JERSEY, as Owner of the Steamship Cushing, for Limitation of Liability.

Consolidated Cause

Augustus N. Hand, U. S. D. J.

We hereby consent to the entry of the foregoing order.
Burlingham, Veeder, Masten & Fearey, Proctors for Petitioner, Southern Pacific Company.

[fol. 865] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of STANDARD OIL COMPANY (New JERSEY), as Owner of the Steamship Cushing, for Exemption from or Limitation of Liability

FINAL DECREE

Whereas a petition was filed on March 14, 1919, by Standard Oil Company (New Jersey) as owner of the teamship Cushing to limit its liability for loss, destruction, damage or injury occasioned by or resulting from a collision between said steamship Cushing and the steamship Proteus, which occurred August 19, 1918; and a petition was filed July 21, 1919, by Southern Pacific Company and Walker D. Hines, Director General of Railroads, as owner and charterer of the steamship Proteus for limitation of their liability for loss, destruc-
[fol. 866] tion, damage or injury occasioned by or resulting from the collision aforesaid, and the petitioners in each of said proceedings having also contested any and all liability occasioned by or resulting from the said collision independently of the limitation of liability claim as aforesaid; and

Whereas by order of this Court entered November 6, 1922, the above proceedings were consolidated and James C. Davis, Director General of Railroads as Agent was substituted as a party herein in lieu of Walker D. Hines, and by further court order the consolidated cause was entitled in the matter of the petition of Standard Oil Company (New Jersey) as owner of the steamship Cushing for exemption from or limitation of liability; and,

Whereas said petitions set forth the facts and circumstances of said collision and all the loss and damage arising therefrom, by reason of which the petitioners claimed exemption from and limitation of liability, and prayed that the Court cause due appraisement to be made of the amount and value of the Petitioner's interests in their respective vessels and freight pending for the voyage, and that the court make an order directing the petitioners to file stipulations with surety to be approved by the Court for the payment into Court of the amounts of the petitioner's interests whenever the Court should so order, and that the Court make an order directing the issuance of a monition to all persons claiming damages for all and any loss, dam-
[fol. 867] age or injury caused by or resulting from the collision aforesaid, citing them to appear before Commissioners to be named by the Court in said order and make due proof of their respective claims at or before a certain time to be fixed by the monition, and further praying that the Court make an order directing that on the giving of such stipulations as should be determined to be proper or on the giving of an ad interim stipulation an injunction issue restraining the commencement or prosecution of any suit, action or legal proceeding of any nature whatever, except these proceedings, against the petitioners in respect of any claim or claims arising out of the aforesaid collision; and

Whereas pursuant to orders of this Court duly made and entered an ad interim stipulation for value in the sum of $500, representing

the value of the interest of the petitioners, Southern Pacific Company and Walker D. Hines, Director General of Railroads, in the Proteus and her pending freight, and the passage moneys was filed by said petitioners and an ad interim stipulation for value in the sum of $1,235,000, representing the value of the interest of the petitioner Standard Oil Company (New Jersey) in the Cushing and her pending freight, was filed by said petitioner; and, monitions were duly issued citing all persons claiming damages for any and all losses, damages or injuries occasioned by or resulting from said [fol. 868] collision against either of the petitioners herein to appear and make due proof of their respective claims on or before times as fixed in said monitions before Louis Bennett, Commissioner, subject to the right of any person to controvert or question the same; and public notice of such monitions was duly given by methods prescribed according to the practice of this court: and

Whereas various claimants hereinafter mentioned filed claims in the proceedings and the said Commissioner duly reported such claims, and various other claimants hereinafter mentioned were by the Court permitted to file claims, and the default of all other claimants in each proceeding was by the Court duly noted; and

Whereas the two proceedings came on to be heard on the pleadings and proofs of the respective parties and were duly argued, and the Court rendered its decision holding both vessels at fault for the collision and the respective petitioners entitled to the benefit of limitation of liability as provided in Sections 4283 and 4285 of the Revised Statutes of the United States and the several acts amendatory thereof and supplementary thereto, and

Whereas an interlocutory decree was duly entered on or about August 30, 1919, in the proceeding of Standard Oil Company (New Jersey), for the limitation of or exemption from liability whereby, among other things, it was referred to Edwards H. Childs, Commissioner, to appraise the steamship Cushing and her pending freight [fol. 869] as of August 19, 1918, and also to take proofs as to the amount, validity and priority of all claims to which objections had been filed, to marshal said claims and to report thereon to this Court, and an interlocutory decree was duly entered on or about July 21, 1919, in the proceeding of Southern Pacific Company and Walker D. Hines, Director General of Railroads for limitation of or exemption from liability whereby among other things it was referred to Herbert Green, Commissioner, to appraise the steamship Proteus and her pending freight and also to take proofs as to the amount, validity and priority of all claims to which exceptions had been filed and to report thereon to this Court; and whereas no proofs were presented to said Commissioner Green and said Commissioner died without making any report, and the parties hereto stipulated and agreed on the claims presented in the said second proceeding, as hereinbefore set forth, and

Whereas said Edwards H. Childs, as Commissioner in the first proceeding filed two reports, from the first of which it appears that the claim for damages of Southern Pacific Company and Walker D. Hines, Director General of Railroads as owner and charterer, respectively of the S. S. Proteus, on account of the loss of said vessel,

should be for the sum of seven hundred fifty thousand dollars ($750,000) with interest thereon from August 19, 1918, and exceptions to this finding were duly filed by both petitioner and claimant, [fol. 870] and the exceptions were duly argued before the Court, and the Court filed an opinion overruling the exceptions and sustaining this finding of the Commissioner, and an order in accordance with this opinion was filed on or about November 8, 1922; and the costs of that part of said reference resulting in the first report having been paid by the petitioner Standard Oil Company (New Jersey) in the sum of $3,213.50 in pursuance of an order of this Court duly entered on or about November 23, 1922; and,

Whereas it appears that the second report of Edwards H. Childs, Commissioner allowed certain claims as follows:

Claim No. 2, Dolores Francis, claimant	$3,500.00
Claim No. 3, Bonita Hearn, claimant with interest from January 4, 1921	5,000.00
Claim No. 4, Roberts, Carter & Co., claimant with interest thereon from August 19, 1918	177,457.59
Claim No. 5, Lucey Manufacturing Corporation, claimant	272.15
[fol. 871] Claim No. 6, United States of America, claimant, Amended by stipulation filed herein to	$9,524.69
With interest from August 19, 1918	9,507.16
Claim No. 7, Robert Gair Company, claimant with interest thereon from November 1, 1918	7,440.00
Claim No. 8, Weiner Bros., claimant with interest thereon from August 19, 1918	20,069.92
Claim No. 9, Wichita Falls Motor Company, claimant with interest thereon from August 19, 1918	4,379.88

And whereas said second report of Edwards H. Childs, Commissioner allowed certain other claims with interest from August 19, 1918 as follows:

Electric Appliance Co.	$83.10
Henry C. Kelley Company	626.52
Gillican-Chipley Company	6,519.44
Harshaw, Fuller & Goodwin Co.	5,655.22
A. M. Dardes	8,914.50
Jefferson Distilling & Denaturing Co.	357.29
Dunbar Molasses & Syrup Co.	3,021.74
The Alden Mills	6,849.78
[fol. 872] U. S. Industrial Alcohol Co.	7,973.59
Sweet, Orr & Co.	2,495.28
J. Spencer Turner Co.	1,009.89
Eggers & Heinlein	3,857.75
Crescent City Moss Ginnery	500.95
The Taber Mills	719.39
Claflin's Inc.	475.80
Forney & Co.	23,464.64
William Whitman & Co. Inc.	1,707.70

E. M. Schwartz Co.	1,604.50
Sol. Friedman & Co.	370.09
McIlhenny Co.	2,949.33
Lucas E. Moore Stave Co.	2,195.75
E. A. Buelow	1,254.56
United Wholesale Grocery Co.	696.89
Joseph S. Otis	300.00
Ralph S. Annis	338.00
Joseph Cangelosi Co. Ltd.	438.08
Underwood Typewriter Co.	118.87
Rosin & Turpentine Export Co.	2,104.31
Turner Commercial & Forwarding Co.	4,567.70
Southern Refining & Mfg. Co.	8,994.60
Mente & Co.	270.85
Mente & Co.	12,567.67
E. A. Buelow & Company	6,791.20
W. R. Grace & Company	395.00

and the costs of that part of said reference resulting in the second report, having been equally divided and paid by the two petitioners, each in the sum of $653.25 in pursuance of an order of this court duly entered on or about November 23, 1922.

[fol. 873] Whereas by stipulation filed herein, the damages sustained by the Southern Pacific Company, and the Director General of Railroads, as owner and charterer of the Proteus other than the damages for the loss of the Proteus have been agreed as follows:

1. Atlantic Hotel, lodging 19 officers and 3 passengers August 22, 1918:	
Interest from Aug. 30, 1918	$35.80
2. Childs Restaurant, meals for 34 officers and passengers:	
Interest from Aug. 30, 1918	32.95
3. The Hub, outfitting crew and male passengers of Proteus:	
Interest from Aug. 30, 1918	4,305.47
4. D. A. Finslow & Co., launch to land wrecked crew from Old Point to shore:	
Interest from Aug. 30, 1918	20.00
5. Miller, Rhoads & Swartz, outfitting female passengers and members of the crew:	
Interest from Aug. 30, 1918	1,026.28
6. H. L. Collier, M. D., medical services August 21, 1918:	
Interest from Aug. 30, 1918	50.00
7. Monticello Hotel Auto Service auto hire:	
Interest from Aug. 30, 1918	9.00
8. Commercial Taxicab Co., auto for female passengers from Old Dominion:	
Interest from Aug. 30, 1918	6.00

[fol. 874]

9. Tony Lorenzo, launch hire, autos and lodging of 64 men of crew and 6 passengers: Interest from Aug. 30, 1918	$400.00
10. Wittenberg Coal Co., attendance fee: Interest from Aug. 30, 1918	131.40
11. Frank A. Evans, tailor, clothes for captain and purser, Aug. 28, 1918: Interest from Aug. 30, 1918	$37.00
12. The Hub, auto to hospital: Interest from Aug. 30, 1918	1.50
13. Old Dominion SS. Line, transportation of passengers and crew to N. Y.: Interest from Aug. 28, 1918	909.66
14. Bar supplies lost and cash proceeds of supplies	268.80
15. Excess baggage charges on lost baggage: Interest from Aug. 31, 1918	21.87
16. Cash from sale of tickets, lost in purser's safe	43.20
17. Value of coal remaining on board when sunk—301 tons at $6.12 per ton	1,842.12
18. Tolls on various telegrams	14.77
19. Value of stores in engine department of SS. Proteus.	679.89
20. Value of stores in deck department of SS. Proteus	436.24
21. Value of fresh water on board SS. Proteus	8.00
22. Equipment in commissary department SS. Proteus 23. Equipment in deck department SS. Proteus 24. Equipment in engine department SS. Proteus	30,000.00

[fol. 875]

25. Steward's supplies on board SS. Proteus	$1,145.30
26. For loss of freight charges	5,440.85
27. Booklovers Library Association, loss of books	18.75

and

Whereas by stipulation filed herein, the claims of said Southern Pacific Company and the Director General of Railroads in behalf of the master, officers and members of the crew of the Proteus for loss of personal effects of the master, officers and crew have been agreed as follows:

28. Harry T. Boyd, master	$749.00
29. J. E. Hallenus, chief officer	311.69
30. C. Scherman, second officer	100.00
31. John Mahlin, carpenter	397.49
32. Gust. Johnson, boatswain	154.09
33. W. I. Fertig, quartermaster	172.91
34. Carl Jordon, quartermaster	119.89
35. Frank Kordek, quartermaster	100.00
36. Fred Locke, seaman	100.00
37. John Slater, seaman	143.85

38. John Blokkerus, seaman	100.00
39. August Brun, seaman	140.77
40. R. W. McHenry, seaman	258.66
41. John William Spaid, seaman	126.89
42. Arthur H. Schweider, chief wireless	241.13
43. Louis J. Gallo, junior wireless	180.52

[fol. 876]

44. J. McDonough, deck boy	94.65
45. John J. Brennan, purser	140.40
46. E. Abella, Chief steward	196.94
47. Jose Curervo, 2nd Asst. steward	110.86
48. A. Jensen, 2nd Cabin steward	112.42
49. John Azvest, chief cook	110.19
50. Adolf Mestagh, baker	152.77
51. D. Paleo, pantryman	137.22
52. Jesus Buges, 2nd pantryman	100.00
53. P. J. Mielitz, porter	114.18
54. Santiago Rey, watchman	265.78
55. Eugene Peral, watchman	100.00
56. J. Ramon Guevera, waiter	206.14
57. Jose Santalla, waiter	100.00
58. A. Gomez, waiter	152.35
59. John Loepez, waiter	100.00
60. G. Margata, waiter	116.05
61. L. M. Brooks, 1st Asst. engineer	170.29
62. E. Harris, 2nd Asst. engineer	136.17
63. R. Dobson, 3rd Asst. engineer	139.54
64. George Steinhauser, junior eng.	100.00
65. Lee Schroeder, oiler	100.00
66. Wm. J. Daley, oiler	100.00
67. G. A. Jeffords, oiler	115.52
68. T. N. Bucholtz, oiler	100.00
69. M. Perez, watertender	111.46
70. Jose Santiago, watertender	180.49
71. E Rifon, watertender	119.16
72. H. Lago, fireman	100.00
73. Adolfo Lariro, fireman	100.00
74. Jose Moran, fireman	173.85
75. C. J. Hansen, fireman	150.37
76. F. Gomez, fireman	201.37

[fol. 877]

77. Antonio Sanchez, fireman	127.81
78. Jesus Vasela, fireman	100.00
79. A. Montero	100.00
80. Antonio Veigo, fireman	100.00
81. M. Bello, coalpasser	130.78
82. Ernest W. Johnson	124.02
83. Margaret Carew, stewardess	186.33

84. S. Bruno	162.63
85. L. P. Horton	120.85
86. P. H. Hammond	105.63
87. Joel E. Reavis—quartermaster	153.49
88. L. A. Turner—Chief engineer	344.89
89. Emillo V. Sanchez	138.18
89a. E. Wermund	100.00

and,

Whereas by stipulation herein, the claims of said Southern Pacific Company and the Director General of Railroads in behalf of passengers of the Proteus for loss of personal effects and in behalf of certain cargo owners for loss of cargo have been agreed as follows:

90. Jerry Hite, 1063 Main St., Rochester, N. Y.	255.00
91. Jose Willis, West Side Foundry Co., Troy, N. Y.	127.32
92. Onofrio Galetta, Bay Shore, L. I.	852.27
93. John Hymes, 308 12th St. Brooklyn, N. Y.	194.43
94. Joseph Robb, % John D. Mackay, Savings Bank Building, Quincy, Mass.	131.22

[fol. 878]

95. A. Paterno & Son, for loss of 4 barrels of wine	164.00
96. M. F. Lopez, for loss of 1 Paige automobile	2,000.00
97. Vulcan Trading Co. for loss of 185 cases of honey	3,085.25
98. Woodward Wight Co. for loss of 1 bale of rubber belting	121.29
99. S. S. Karpen & Bros. for loss of 117 bales of moss	1,232.76
100. Lieutenant Commander C. M. Byrns for loss of 1 box merchandise	115.00
101. William Bal Co. for loss 6 trunks	99.00
102. P. Lorillard Co. for loss 40 bags sugar	658.98
103. Pelican Lake Oyster & Packing Co. Ltd. for loss of 250 cases canned tomatoes	1,015.00
104. Phœnix Mfg. Co. for loss of 2 pieces of holly suit	31.25
105. American Turpentine & Tar Co. for loss 115 barrels pine tar	1,748.15
106. Lubell Bros. for loss 2 cases of shirts	162.96
107. Coren's Bag Co. for loss 46 lbs. Burlap bags	5,888.75
108. Chapman Valve Mfg. Co. for loss of crate of valves.	111.00
109. The Thread Agency, for loss of shipment of thread	48.45
110. Hing Long & Co., for loss of 4 bbls. shrimp and 1 bbl. fish	414.14

[fol. 879]

111. Fillican-Chipley Co for loss of 2 empty drums	20.00
112. American Sugar Refining Co. for loss of 540 sacks boneblack	2,851.57
113. On Yick & Co. for loss of 1 bbl. dried shrimp	46.50

114.	Fou Loy & Co. for loss of 5 bbl. dry shrimp.....	304.92
115.	C. W. Faber, Inc., for loss of 1 case cigars.....	166.36
116.	C. A. King & Co. for loss of 100 cases canned okra and tomatoes	394.00
117.	Bloom & Millman for loss of 1 case of smocks.....	150.00
118.	Pelican Lake Oyster & Packing Co. Ltd. for loss of 100 cases canned tomatoes.....	270.00
119.	E. P. Dutton Co. for loss of 1 case of books.....	300.00
120.	Louisiana Canning Co. for loss of 200 cases of okra.	788.00

and

Whereas by stipulation filed herein the claim of Duane Shoe Company has been agreed in the sum of eighty four and 60/100 dollars ($84.60) with interest from August 19, 1918, and the claim of American Alcohol Company has been agreed in the sum of fifteen thousand five hundred sixty seven and 51/100 dollars ($15,567.51) [fol. 880] with interest from August 19, 1918,

and,

Whereas by stipulation filed herein the claim of Standard Oil Company (New Jersey) as owner of the Cushing for loss and damage resulting from the collision between the Proteus and the Cushing on August 19, 1918, have been agreed as follows:

No.	Description	Amount
8.	Lloyds Register of Shipping. For survey and certificate, August 24, 1918. Bill No. 2112. Interest from August 29, 1918.....	$47.25
9.	Lloyds Register of Shipping. For survey of damage repairs October 4, 1918. Bill No. 2454.....	500.00
10.	Newport News Ship Building & Dry Dock Co. For preparing vessel for survey August 31, 1918. Bill No. 68514 (S. O.'s No. 4593). Interest from October 7, 1918.....	275.05
11.	Baltimore Dry Docks & Ship Building Co. For dry docking and repairs less credit of $827.28 October 29, 1918. Bill No. 732 (S. O.'s No. 4829). Interest from Jan. 3, 1919.....	1,416.50
12.	Baltimore Dry Docks & Ship Building Co. For repairs and labor October 25th, 1918. Bill No. 713. (S. O.'s No. 4636.) Interest from Jan. 18, 1919.....	2,162.60

[fol. 881]

13.	Baltimore Dry Docks & Ship Building Co. Bill for repairs and renewals in accordance with specifications dated August 22, 1918. Bill No. 620 dated October 2, 1918: Interest from Oct. 28, 1918	67,000.00

No.	Description	Amount
14.	Federal Composition Paint Co. Ltd. for Bottom paints. Bill No. 2583 (S. O.'s 4636):	
	Interest from Nov. 6, 1918	463.25
22.	Telephone call from Baltimore December 18, 1918 (S. O.'s No. 3148):	
	Interest from December 18, 1918	.35
23.	Expenses of James C. White, S. O. Co, Marine Supt. Transportation to Newport News and Baltimore August 27, 1918 (S. O.'s No. 4593):	
	Interest from August 31, 1918	56.79
24.	Expenses of N. Marshall, S. O. Co., shore Engineer, Philadelphia to Baltimore and return December 28, 1918 (S. O.'s No. 4829):	
	Interest from Jan. 7, 1919	21.72
25.	Expenses of N. Marshall, S. O. Co. Two trips to Baltimore December 28, 1918 (S. O.'s No. 4829):	
	Interest from Jan. 7, 1919	139.12
26.	Expenses of J. C. White, S. O. Co. Marine Supt. Baltimore and return September 6, 1918 (S. O.'s No. 4636):	
	Interest from Sept. 10, 1918	21.21
[fol. 882]		
27.	Expenses of J. C. Whilte, S. O. Co. Marine Supt. Baltimore to New York, September 30, 1918 (S. O.'s No. 4636):	
	Interest from October 4, 1918	13.93
28.	Expenses of J. C. White, S. O. Co., Marine Supt. Trip to Baltimore September 30, 1918 (S. O.'s No. 4636):	
	Interest from Oct. 16, 1918	20.44
29.	Expenses of N. Marshall, S. O. Co., Shore Engineer, Baltimore and return December 28, 1918 (S. O.'s No. 4829)	20.36
	Interest from Jan. 7, 1919.	
30.	Henry R. Buttner, Custom House Brokerage (entering). August 25, 1918	2.50
	Interest from Aug. 25, 1918.	
31.	Steam Tug M. Mitchell Davis. Towage from stream to Baltimore Dry Dock August 25, 1918	49.70
	Interest from Oct. 18, 1918.	
32.	Pilot's Office. For pilotage; Baltimore. August 26, 1918. (S. O.'s No. 4636)	125.00
	Interest from August 26, 1918.	
33.	Fred Goodheus & Co. for services rendered including transportation to dry dock and in stream October 1, 1918	30.00
	Interest from Oct. 18, 1918.	

No.	Description	Amount
34.	George W. Hartman. For Launch services rendered to Cushing while lying at anchor. Two [fol. 883] trips August 25, 1918 ..... Interest from Oct. 18, 1918.	5.00
38.	Wilbur F. Spice, for local and long distance telephone calls, October 29, 1918 ..... Interest from Oct. 18, 1918.	7.60
39.	Wilbur F. Spice, for additional attendance fees and surveys repayments made to master to cover payrolls and checking same ..... Interest from Oct. 18, 1918.	15.00
40.	Stewart Taxi Service Co., for taxi service from Camden to upper dry dock August 31, 1918 ..... Interest from Oct. 18, 1918.	1.50
41.	Stewart Taxi Service Co., for taxi service C. of C. to upper dry dock August 26, 1918 ..... Interest from Oct. 18, 1918.	1.00
42.	Stewart Taxi Service Co., for taxi service from C. of C. waiting and to upper dry dock September 7, 1918 ..... Interest from Oct. 18, 1918.	2.00
43.	Virginia Pilot Association, for pilotage from Norfolk to Newport News and from Newport News to sea and transfer Area D. to Newport News August 21, 1918. (S. O.'s No. 4593) ..... Interest from Sept. 4, 1918.	265.00
44.	Virginia Pilot Association. For pilotage from sea to Norfolk August 20, 1918. (S. O.'s No. 5671).. Interest from Aug. 29, 1918.	123.00
[fol. 884]		
45.	Virginia Pilot Association. For anchorage to Newport News August 21, 1918 (S. O.'s No. 5671) ... Interest from Aug. 29, 1918.	10.00
46.	Wittenberg Coal Co. For auto hire, attendance fee and telephone, August 21, 1918. (S. O.'s No. 5671)	67.20
47.	H. C. Leslie, Agent. For telephone, telegraph and postage, August 24, 1918 ..... Interest from Sept. 4, 1918.	43.90
48.	H. C. Leslie, Agent. For attendance August 24, 1918 ..... Interest from Sept. 4, 1918.	50.00
49.	Newport News Ship Watching Co. For 14 watches at $6.00, August 24, 1918 ..... Interest from Sept. 4, 1918.	84.00
50.	Postal Telegraph & Cable Co. For telegrams August 21. (S. O.'s No. 4593) ..... Interest from October 2, 1918.	1.50

No.	Description	Amount
51.	Wittenberg Coal Co. For disbursements noting protest August 28, 1918. (S. O.'s No. 4593) .... Interest from Sept. 24, 1918.	5.00
52.	Standard Oil Co. For telegrams in New York	29.47
53.	J. H. Johnson. For estimate of value in damaged condition including certificate ..... Interest from Jan. 31, 1919.	100.00
[fol. 885]		
65.	Time lost from August 19, 1918 during which permanent repairs necessitated by the collision were being made—42½ days at $1,800.00 per day (based on the rate United States Shipping Board time charter) ..... Interest from Oct. 2, 1918.	76,500.00
66.	Commis-ion to General Average Adjusters on general average disbursements and for advancing funds at 2½%	20.15
67.	To General Average Adjusters for lithographing general average statement	25.00
68.	Fee to General Average Adjusters for general average statement	150.00

and,

Whereas it appears by a stipulation filed herein that the value of the steamship Proteus and her pending freight and passage moneys as heretofore appraised at the sum of $308.07 by W. J. Baker and H. T. Boyd whose affidavits verified respectively July 14 and July 10, 1919, were duly filed with the clerk of this court, correctly represents the value of the interest of the Southern Pacific Company and James C. Davis Director General of Railroads, as agent, in the steamship Proteus and her freight and passage moneys pending at the termination of the voyage on which she was engaged at the time of the collision aforesaid.

[fol. 886] Now, it is by the Court

Ordered, adjudged and decreed that the collision between the steamships Cushing and Proteus on August 19, 1918, and the subsequent sinking and loss of the steamship Proteus, and the losses, damages, injuries and destruction resulting from said collision and sinking were occasioned and incurred without the privity or knowledge of the petitioners and that each of the petitioners, Standard Oil Company (New Jersey) and Southern Pacific Company, and James C. Davis, Director General of Railroads, as agent, is entitled to limitation of liability as provided by Sections 4283 to 4285 of the Revised Statutes of the United States and the several acts amendatory thereof and supplementary thereto, and that the liability of the Southern Pacific Company and James C. Davis, Director General of Railroads, as agent, as owner and charterer respectively of the Steamship Proteus be and the same hereby is limited to the sum of Three hundred eight and 7/100 dollars ($308.07) together with interest thereon from August 19, 1918; and it is further

Ordered, adjudged and decreed that the aforesaid collision between the steamships Proteus and Cushing on August 19, 1918, was caused by mutual fault on the part of the steamships Proteus and Cushing and that the Petitioners Southern Pacific Company and James C. Davis, Director General of Railroads, as agent bear one-[fol. 887] half of the total damage of the collision, and that the petitioner Standard Oil Company bear one-half of the total damage of the collision; and it is further

Ordered, adjudged, and decreed that the default of all persons who may have sustained or who may claim for any loss, damage, injury or destruction resulting or arising from or growing out of the aforesaid collision, and who have not heretofore presented or filed claims in these proceedings be, and the same hereby is entered, and that all claims which have not heretofore been presented or filed in these proceedings be, and the same hereby are, forever barred, and that the petitioner Standard Oil Company (New Jersey) and the Steamship Cushing and the petitioners Southern Pacific Company, and James C. Davis, Director General of Railroads, as agent, and the steamship Proteus be, and they hereby are, discharged from all liability in respect thereof; and it is further

Ordered, adjudged and decreed that all persons who filed claims herein, and all other persons whatsoever claiming, or who may hereafter claim for any loss, damage, injury or destruction or any matter whatsoever in any way resulting or arising from or growing out of the aforesaid collision be and they hereby are perpetually restrained and enjoined from bringing or instituting and from prosecuting any action, suit or proceeding of whatever nature, on any cause [fol. 888] whatsoever, in any country or jurisdiction against the Standard Oil Company (New Jersey) or the Steamship Cushing, or the Southern Pacific Company or James C. Davis, Director General of Railroads as Agent, or the S. S. Proteus for any loss, damage, injury or destruction done, suffered, occasioned by or resulting or arising from the aforesaid collision; and it is further

Ordered, adjudged and decreed that the following claimants recover herein from the petitioner, Standard Oil Company (New Jersey) and/or its stipulators the sums set opposite their respective names, as follows:

1. Dolores Francis:		
Claim	$3,500	
Interest Jan. 13, 1921 to Nov. 28, 1922	393.53	
Costs	7.50	
Total		$3,895.03
2. Bonita Hearn:		
Claim	5,000	
Interest Jan. 4, 1921 to Nov. 28, 1922	569.58	
No costs.		
Total		5,569.58

3. Lucey Manufacturing Corporation:

Claim	272.15	
Interest Aug. 19, 1918 to Nov. 28, 1922	69.84	
No costs.		
Total		341.99

[fol. 889]

4. United States of America:

Claim	9,507.16	
Interest Aug. 19, 1918 to Nov. 28, 1922	2,439.56	
No costs.		
Total		11,946.72

5. Robert Gair Company:

Claim	7,440	
Interest Nov. 1, 1918 to Nov. 28, 1922	1,818.62	
No costs.		
Total		9,258.62

6. W. R. Grace & Co.:

Claim	395	
Interest Aug. 19, 1918 to Nov. 28, 1922	101.36	
No costs.		
Total		496.36

7. Duane Shoe Company:

Claim	84.60	
Interest Aug. 19, 1918 to Nov. 28, 1922	21.71	
No costs.		
Total		106.31

8. Roberts, Carter & Company:

Claim	177,457.59	
Interest Aug. 19, 1918 to Nov. 28, 1922	45,536.06	
Costs	101.07	
Total		223,094.72

9. Wiener Brothers:

Claim	20,069.92	
[fol. 890]		
Interest Aug. 19, 1918 to Nov. 28, 1922	5,150.00	
No costs.		
Total		25,219.92

10. Wichita Falls Motor Co.:

Claim	4,379.88	
Interest Aug. 19, 1918 to Nov. 28, 1922	1,123.89	
No costs.		
Total		5,503.77

11. Electric Appliance Co.:

Claim	83.10	
Interest Aug. 19, 1918 to Nov. 28, 1922	21.32	
No costs.		
Total		104.42

12. Henry C. Kelley Company:

Claim	626.52	
Interest Aug. 19, 1918 to Nov. 28, 1922	160.76	
No costs.		
Total		787.28

13. Gillican-Chipley Company:

Claim	6,519.44	
Interest Aug. 19, 1918 to Nov. 28, 1922	1,672.90	
No costs.		
Total		8,192.34

[fol. 891]

14. Harshaw, Fuller & Goodwin Company:

Claim	5,655.22	
Interest Aug. 19, 1918 to Nov. 28, 1922	1,451.13	
No costs.		
Total		7,106.35

15. A. M. Dardis:

Claim	8,914.50	
Interest Aug. 19, 1918 to Nov. 28, 1922	2,287.47	
No costs.		
Total		11,201.97

16. Jefferson Distilling and Denaturing Co.:

Claim	357.29	
Interest Aug. 19, 1918 to Nov. 28, 1922	91.67	
No costs.		
Total		448.96

17. Dunbar Molasses & Syrup Co.:

Claim	3,021.74	
Interest Aug. 19, 1918 to Nov. 28, 1922	775.38	
No costs.		
Total		3,797.12

18. The Alden Mills:

Claim	6,849.78	
Interest Aug. 19, 1918 to Nov. 28, 1922	1,757.66	
No costs.		
Total		8,690.44

[fol. 892]

19. U. S. Industrial Alcohol Co.:

Claim	7,973.59	
Interest Aug. 19, 1918 to Nov. 28, 1922	2,046.03	
No costs.		
Total		10,019.62

20. Sweet, Orr & Co.:

Claim	2,495.28	
Interest Aug. 19, 1918 to Nov. 28, 1922	640.29	
No costs.		
Total		3,135.57

21. J. Spencer Turner Co.:

Claim	1,009.89	
Interest Aug. 19, 1918 to Nov. 28, 1922	259.14	
No costs.		
Total		1,269.03

22. Eggers & Heinlein:

Claim	3,857.75	
Interest Aug. 19, 1918 to Nov. 28, 1922	989.90	
No costs.		
Total		4,847.65

23. Crescent City Moss Ginnery:

Claim	500.95	
Interest Aug. 19, 1918 to Nov. 28, 1922	128.54	
No costs.		
Total		629.49

[fol. 893]

24. The Tober Mills:

Claim	719.39	
Interest Aug. 19, 1918 to Nov. 28, 1922	184.59	
No costs.		
Total		903.98

25. Claflin's, Inc.:

Claim	475.80	
Interest Aug. 19, 1918 to Nov. 28, 1922	122.09	
No costs.		
Total		597.89

26. Forney & Co.:

Claim	23,464.64	
Interest Aug. 19, 1918 to Nov. 28, 1922	6,021.08	
No costs.		
Total		29,485.72

27. William Whitman & Co.:

Claim	1,707.70	
Interest Aug. 19, 1918 to Nov. 28, 1922	438.20	
No costs.		
Total		2,145.90

28. E. M. Schwartz & Co.:

Claim	1,604.50	
Interest Aug. 19, 1918 to Nov. 28, 1922	411.71	
No costs.		
Total		2,016.21

[fol. 894]

29. Sol. Friedman & Co.:

Claim	370.09	
Interest Aug. 19, 1918 to Nov. 28, 1922	94.96	
No costs.		
Total		465.05

30. McHenry Co.:

Claim	2,949.33	
Interest Aug. 19, 1918 to Nov. 28, 1922	756.81	
No costs.		
Total		3,706.14

31. Lucas E. Moore Stave Co.:

Claim	2,195.75	
Interest Aug. 19, 1918 to Nov. 28, 1922	563.43	
No costs.		
Total		2,759.18

32. E. A. Buelow:

Claim	1,254.56	
Interest Aug. 19, 1918 to Nov. 28, 1922	321.91	
No costs.		
Total		1,576.47

33. United Wholesale Grocery Co.:

Claim	696.89	
Interest Aug. 19, 1918 to Nov. 28, 1922	178.82	
No costs.		
Total		875.71

[fol. 895]

34. Joseph S. Otis:

Claim	300	
Interest Aug. 19, 1918 to Nov. 28, 1922	76.98	
No costs		
Total		376.98

35. Ralph B. Annis Co., Inc.:

Claim	338.00	
Interest Aug. 19, 1918 to Nov. 28, 1922	86.73	
No costs.		
Total		424.73

36. Joseph Cangelosi Co., Ltd.:

Claim	438.08	
Interest Aug. 19, 1918 to Nov. 28, 1922	112.41	
No costs.		
Total		550.49

37. Underwood Typewriter Co.:

Claim	118.87	
Interest Aug. 19, 1918 to Nov. 28, 1922	30.50	
No costs.		
Total		149.37

38. Rosin & Turpentine Export Co.:

Claim	2,104.31	
Interest Aug. 19, 1918 to Nov. 28, 1922	539.97	
No costs.		
Total		2,644.28

[fol. 896]

39. Turner Commercial & Forwarding Co.:

Claim	4,567.70	
Interest Aug. 19, 1918 to Nov. 28, 1922	1,172.08	
No costs.		
Total		5,739.78

40. Southern Refining & Mfg. Co.:

Claim	8,994.60	
Interest Aug. 19, 1918 to Nov. 28, 1922	2,308.03	
No costs.		
Total		11,302.63

41. Mente & Co.:

Claim	270.85	
Interest Aug. 19, 1918 to Nov. 28, 1922	69.50	
No costs.		
Total		340.35

42. Mente & Co.:

Claim	12,567.67	
Interest Aug. 19, 1918 to Nov. 28, 1922	3,224.89	
No costs.		
Total		15,792.56

43. E. A. Buelow:

Claim	6,791.20	
Interest Aug. 19, 1918 to Nov. 28, 1922	1,742.64	
No costs.		
Total		8,533.84

44. American Alcohol Co.:

Claim	15,567.51	
Interest Aug. 19, 1918 to Nov. 28, 1922	3,994.66	
No costs.		
Total		19,562.17

[fol. 897] And it appearing that the total damages sustained by cargo claimants and passengers exclusive of those for whom the Southern Pacific Company and Director General of Railroads filed claim as bailee amount to the sum of $363,468.79 together with interest to November 28, 1922 in the sum of $91,958.33 and costs as taxed in the sum of $102.57 making a total of $445,529.69.

And it appearing that the damages sustained by Standard Oil Company (New Jersey) as owner of the steamship Cushing amount to the sum of $149,874.09 together with interest to November 28, 1922 in the sum of $37,012.43 and costs as taxed in the sum of $542.05 making a total of $187,428.57.

And it appearing that the damages sustained by the Southern Pacific Company and James C. Davis, Director General of Railroads, as agent, as owner and charterer respectively of the steamship Proteus and as bailee of the effects of passengers, master, officers and crew of the Proteus and as bailee of certain cargo amount to the sum of $830,412.19 together with interest to November 28, 1922 in the sum of $213,078.10 and costs as taxed in the sum of $365.75 making a total of $1,043,856.04.

And it appearing that the total damages arising from the said collision amount to the sum of $1,686,814.30 which sum includes interest to November 28, 1922 and costs as taxed it is further Ordered, adjudged and decreed that the Southern Pacific Company [fol. 898] and James C. Davis, Director General of Railroads, as agent, recover from the petitioner, Standard Oil Company (New Jersey) with interest until paid the sum of two hundred thousand, four hundred forty-eight and 89/100 dollars ($200,448.89) being one-half of the difference between the amount of their damages as aforesaid including interest to November 28, 1922, and costs and the damages sustained by the Standard Oil Company (New Jersey) as owner of the Cushing, with interest to November 28th, 1922 and costs, including the amount paid by the Standard Oil Company (New Jersey) to the cargo claimants as aforesaid, and it further

Ordered that unless this decree be satisfied or an appeal be taken from this decree within the time limited by law and the rules and practice of this Court, the stipulators for costs and for the value of the SS. Cushing will cause their engagements to be performed or show cause why such execution should not issue against their goods, chattels and credits to enforce satisfaction thereof; and it is further

Ordered that service of this decree may be made within the Southern District of New York by any person of full age, by delivering a copy thereof to any person or corporation to be served or his or its attorney and that services may be made in any other district by the United States Marshal for said district by delivering a copy of such decree and exhibiting a certified copy thereof to the person or corporation to be served, or his or its attorney.

Learned Hand, U. S. D. J.

[fol. 899] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of STANDARD OIL COMPANY (NEW Jersey), as Owner of Steamship Cushing, for Exemption from or Limitation of Liability

Consolidated Cause 68-29

NOTICE OF APPEAL

SIRS: Please take notice that the petitioner, Standard Oil Company (New Jersey), owner of the Steamship Cushing, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit at the next term thereof, to be held in the United States Court and Post Office Building, Borough of Manhattan, City of New York, from the final decree entered in the office of the Clerk of this Court on November 28, 1922.

Dated, December 27, 1922.

Yours, etc. Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Petitioner.

[fol. 900] To Burlingham, Veeder, Masten & Fearey, Esqs., Proctors for SS. Proteus; Edward B. Levy, Esq., Frank M. Patterson, Esq., Harold J. Roig, Esq., Foley & Martin, Esqs., Cohen Brothers, Esqs., William Hayward, Esq., U. S. Attorney; Bigham, Englar & Jones, Esqs., Henry O. Falk, Esq., Proctors for Claimants; Alexander Gilchrist, Jr., Esq., Clerk.

[fol. 901] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of STANDARD OIL COMPANY (NEW Jersey), as Owner of the Steamship Cushing, for Exemption from or Limitation of Liability

ASSIGNMENTS OF ERROR

Standard Oil Company (New Jersey), the Petitioner herein, hereby assigns error, in the opinion, findings, and decree of the United States District Court, Southern District of New York, as follows:

1. In that the Court did not wholly exempt the Petitioner from liability for damages resulting from collision between the Petitioner's steamship Cushing, and the steamship Proteus.

2. In that the Court did not find that the faults in the navigation of the steamship Proteus were the sole cause of the collision between the Cushing and the Proteus.

3. In that the Court found that there was risk of collision prior to the change of course by the Proteus.

[fol. 902] 4. In that the Court found that the Cushing was at fault for not sooner altering her course.

5. In that the Court found that the Cushing was at fault for not sounding a signal of warning to the Proteus.

6. In that the Court found that the Cushing was at fault for not sooner turning on her running lights.

7. In that the Court found that the officer in charge of the Cushing's navigation should have assumed that the Proteus would navigate contrary to the rules.

8. In that the Court found that the officer in charge of the Cushing's navigation should have assumed that those in charge of the Proteus could not seasonably make out the Cushing under the weather conditions prevailing.

9. In that the Court found that the officer in charge of the Cushing's navigation did not have the right to assume that those in charge of the navigation of the Proteus would sight the Cushing seasonably.

10. In that the Court did not find that the time of displaying the running lights of the Cushing was immaterial, in view of the premature and unnecessary change of course by the Proteus.

[fol. 903] 11. In that the Court did not resolve all doubts as to the propriety of the Cushing's navigation in favor of the Cushing, in view of the gross faults in the navigation of the Proteus, which were alone sufficient to explain the collision.

Dated New York, January 18, 1923.

Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Petitioner (Standard Oil Company of New Jersey).

27 William Street, New York City.

[fol. 904] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of STANDARD OIL COMPANY (N. J.), Owner of SS. Cushing, for Limitation of Liability

NOTICE OF APPEAL

SIRS: Take notice that the claimant, Southern Pacific Company, hereby appeals to the United States Circuit Court of Appeals for the Second District, from the final decree entered herein November 28, 1922, in so far as said decree fixes the value of the SS. Proteus as of August 19, 1918, at the sum of $750,000.

Dated, New York, January 27, 1923.

Yours, etc., Burlingham, Veeder, Masten & Fearey, Proctors for Claimant Southern Pacific Company.

[fol. 905] To Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Petitioners; Edward B. Levy, Frank M. Patterson, Harold J. Roig, Foley & Martin, Cohen Brothers, William Hayward, Bigham, Englar & Jones, Henry O. Falk, Proctors for Claimants; Alexander Gilchrist, Jr., Clerk.

[fol. 906] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of STANDARD OIL COMPANY (N. J.), Owner of SS. Cushing, for Limitation of Liability

ASSIGNMENTS OF ERROR

Southern Pacific Company, claimant herein, hereby assigns error in the decision and decree of this court in so far as they relate to the valuation of the SS. Proteus, as follows:

1. In that the Court overruled claimant's exceptions to the report of the Commissioner filed herein April 22, 1922.

2. In that the Court found the value of the SS. Proteus as of August 19, 1918, to have been $750,000.

3. In that the Court did not fix the value of the SS. Proteus as of August 19, 1918, at the sum of $1,225,000 as established by the preponderance of the evidence.

Burlingham, Veeder, Masten & Fearey, Proctors for Claimant Southern Pacific Company.

[fol. 907] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of STANDARD OIL COMPANY (NEW Jersey), Owner of the Steamship Cushing, for Limitation of Liability

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto that the following exhibits may be omitted from the transcript of record on appeal herein and may be offered on the argument of said appeal as though fully printed:

DEPOSITION EXHIBITS

Standard Oil Company (New Jersey):

Exhibit 3—Log (Rough Engine).
Exhibit 4—For identification—scrap deck log.
Exhibit 2—Scrap deck log.

Exhibit 3—For identification—Smooth deck log.
Exhibits 4, 5, 6—Pictures of steamship Cushing.
Exhibit 2—Requisition charter. Southern Pacific Company.
Exhibit B—Figures made by witness Brown.
Exhibits C, D, E, F—Photographs of steamship Cushing.
Exhibit 1—Blue print of steamship Proteus.

[fol. 908] Trial

Southern Pacific Company

Exhibits A, B, C, D, E, F—Photographs.
Exhi it G—Letter from Navy Department.
Exhibits H, I—Prints of design of steamship Cushing.
Exhibit J—Van Buskirk diagram.
Exhibit K—Photograph of Secretary Daniels, and it is further

Stipulated and agreed that any exhibits offered in evidence herei and not specifically mentioned above may be also omitted from th transcript of record and may be offered on the argument of th appeal.

Dated, New York, February 19, 1923.

Kirlin, Woolsey, Camp'ell. Hickox & Keating, Proctors fo SS. Cushing. Burlingham, Veeder, Masten & Feare Proctors for SS. Proteus. Foley & Martin, Proctors fo Robert Gair Co. Bigham, Englar & Jones, Proctors fo Roberts, et al. Wm. Hayward, U. S. Atty.; Cohen Bros Proctors for Dolores Francis. Harold J. Roig, Atty. fo W. R. Grace & Co.. Edward B. Levy, Proctor for Duar Shoe Co. Henry O. Falk, Proctor for Bonita Hear Frank M. Patterson, Proctor for Lucey Mfg. Co.

[fol. 909] In United States District Court, Southern Distric of New York

In the Matter of the Petition of Standard Oil Company (Ne Jersey, Owner of the Steamship Cushing, for Limitation Liability

Stipulation as to Certification of Record

The proctors for the various cargo claimants herein hereby waiv examination of the proof of the transcript of record on appeal an agree to settle the said transcript of record as agreed upon by Messr Kirlin, Woolsey, Campbell, Hickox & Keating, Messrs. Burlin ham, Veeder, Masten & Fearey and Messrs. Bigham, Englar Jones, waive certification thereof, and authorize Messrs. Bigham

[fol. 910] Englar & Jones, proctors for cargo claimants, to sign on their behalf stipulation settling the record.

Dated, New York, February 19, 1923.

Frank M. Patterson, Proctor for Lucey Mfg. Co. Cohen Bros., Proctors for Dolores Francis. Foley & Martin, Proctors for Robert Gair Co. Edward B. Levy, Proctor for Duane Shoe Co. Henry O. Falk, Proctor for Bonita Hearn. Wm. Hayward, U. S. Atty.; Harold J. Roig, Atty. for W. R. Grace & Co., Proctors for Cargo Claimants.

[fol. 911] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of THE STANDARD OIL COMPANY OF NEW JERSEY, as Owner of the Steamship Cushing, for Exemption from or Limitation of Liability

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing (in 2 vols.) is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated March —, 1923.

Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Standard Oil Company. Burlingham, Veeder, Masten & Fearey, Proctors for S. S. Proteus. Edward B. Levy, Esq., Frank M. Patterson, Esq., Harold J. Roig, Esq., Foley & Martin, Esqs., Cohen Brothers, Esqs., William Hayward, Esq., U. S. Attorney; Bigham, Englar & Jones, Esqs., Henry O. Falk, Esq., Proctors for Claimants.

[fol. 912] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of THE STANDARD OIL COMPANY OF NEW JERSEY, as Owner of the Steamship Cushing, for Exemption from or Limitation of Liability

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing (in 2 vols.) is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York this — day of March, in the year of our Lord one thousand nine hundred and twenty-three of the Independence of the said United States the one hundred and forty-seventh.

Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 913] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1922

No. 258

Argued April 20, 1923. Decided July 16, 1923

OPINION

In the Matter of the Petition of STANDARD OIL COMPANY OF NEW JERSEY, as Owner, of the Steamship "Cushing," for Limitation of Liability; STANDARD OIL COMPANY OF NEW JERSEY (Petitioner), and SOUTHERN PACIFIC COMPANY, Owner of the Steamship "Proteus" (Claimant), Appellants; ROBERT CARTER & Co. et al., Owners of cargo on the Steamship "Proteus," Claimants-Appellees

Appeals from the District Court of the United States for the Southern District of New York

[fol. 914] Before Rogers, Hough, and Manton, Circuit Judges

Appeals from the United States District Court of the Southern District of New York. A libel was filed by the Southern Pacific Railroad Company against the steamship Cushing. Limitation of liability proceedings were instituted by the Standard Oil Company of New Jersey as owner of the Steamship Cushing and by the Southern Pacific Company as owner of the Steamship Proteus, in which the Director General of Railroads joined as a petitioner. The proceedings were consolidated. A decree was entered assessing damages against both vessels for loss of the Proteus and her cargo. Both petitioners appeal. Modified.

Burlingham, Veeder, Masten & Fearey, Esqs., Proctors for Southern Pacific Co.; Charles C. Burlingham, Chauncey I. Clark, A. Howard Neeley, Ralph W. Brown, of Counsel.

Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for Petitioner-Appellant; J. Parker Kirlin, W. H. McGrann, Advocates.

Bigham, Englar & Jones, Esqs., Proctors for Certain Cargo Claimants-Appellees; D. Roger Englar, T. Catesby Jones, James W. Ryan, Advocates.

[fol. 915] MANTON, Circuit Judge:

On September 11, 1918, the Southern Pacific Company, as owner of the Steamship Proteus, filed its libel against the Cushing. Several actions were begun in the New York Supreme Court against the Steamship Proteus and the Standard Oil Company of New Jersey for personal injury and property loss. On March 14, 1919, the Standard Oil Company of New Jersey filed its petition for limitation of liability On January 21, 1921, the Southern Pacific Company, as owner of the Proteus, and Walter H. Hines, as Director General of Railroads, filed a petition for limitation of liability. After a trial, the court below held both the Cushing and the Proteus at fault and referred the matter of damages to a commissioner who, after taking proofs, fixed the value of the steamship Proteus at seven hundred and fifty thousand dollars. A very large number of the Proteus cargo owners have been awarded damages for their losses. This appeal presents no question as to the amounts awarded cargo owners. The question argued is the liability of the respective steamships and the amount fixed as the value of the Steamship Proteus.

The Proteus was bound from New Orleans to New York, and the Cushing was on a voyage from New York to Beaumont, Texas, in ballast. On passing the Lookout Shoal Lightship at about 9:45 P. M. on August 18, 1918, the Proteus set her course for Diamond Shoals Gas Buoy N. 50° E. true. It was a clear night with the moon shin-[fol. 916] ing, but at times obscured by the clouds. Both vessels were running without lights, the Proteus at full speed of 13½ knots. The Cushing in the early morning of August 19th, was steering her course S. 40° W. true, at full speed, making 12½ knots. The second officer of the Cushing was on the bridge in charge and alone. There was a lookout in the crows nest and another forward on the forecastle head. The vessels were on practically opposite courses. The Proteus about N. E. and the Cushing about S. W., the courses lacking about three degrees of being parallel. The starboard bow of the Cushing was camouflaged to make her appear to be on a course three points to starboard of her real course. The moon was two days short of being full and was shining over the Proteus' port quarter and on the Cushing's starboard bow. About fifteen minutes before the collision and at about 12:50 (The Cushing's time), the Cushing observed a ship without lights which proved to be the Proteus, on the Cushing's starboard bow, about five miles distant. The Cushing continued at full speed without changing her course or switching on her lights. The Proteus did not see the Cushing, which was camouflaged until three-quarters of a mile or a mile off. She appeared to be about dead ahead or a little on the port bow and the Proteus immediately hard aported her helm. The Proteus kept on at full speed with her helm hard aport until the collision, which was about two and a half to three minutes later. The Cushing's second officer, watching the Proteus, [fol. 917] discovered the alteration immediately after it started three-quarters of a mile away or about three minutes before the collision. He says the Proteus was then bearing three and a half points on the starboard bow. Some time afterward, about a minute and a half, he

ported and switched on the Cushing's lights. And later he hard aported and just before the collision reversed her engines. The Cushing swung two and a half points to starboard just before the collision. Her change of course as the Cushing's steering compass read was S. 75° W. at the time of the collision, 25° change from her compass of S. 50° W. or from S. 47° W. true to S. 72° W. true. Thus, at the time of the collision, the angle of the collision was about 70° as fixed by the second officer of the Cushing and the Proteus was headed at the time of the collision E. 52° S. true, and the latter swung under her hard aport helm 92° or eight points. The time of the collision was 1:05 A. M. All agreed it was a moonlight night and the weather fine and clear with passing clouds. Each vessel was proceeding without lights under orders of the Government. The Proteus apparently swung eight points to starboard before the collision and in making the turn, her bow went about thirteen hundred feet and at the same time made good between eleven and twelve hundred feet to starboard of her original course. This manœuvre was executed in two minutes. This calculation is arrived at by applying the distance actually travelled by her bow (2,000 ft.) and the speed of the ship in making the turn (10 knots an hour) or seventy-five [fol. 918] per cent of the initial speed. During the early part of these two minutes, the Cushing, as found below, was going ahead full speed at 12½ knots, a distance of sixteen or seventeen hundred feet. After reversing full speed, her bow continued to advance about eight hundred and fifty feet; she made good about one hundred and fifty feet to starboard of the original course. The calculation as to the Cushing is based upon the fact that the Cushing's stern never left the first course she was on and while her bow swung to starboard through an arc of two points. The Cushing's bow was, therefore, about twenty-five hundred feet behind the point of collision when the Proteus ported and the vessels were then about four thousand feet apart; the Proteus being a little more than a point and a half on the Cushing's starboard bow. Below, the Proteus was held at fault for failing to sound her whistle until midway on her swing and for failing to switch on her lights at once when she began to manœuvre three minutes before the collision. And the Cushing was held at fault for having the Proteus in full view for fifteen minutes and failing either to warn the Proteus of her advance or "put between them a safe distance." It was held that she failed to starboard and give the Proteus more room when there was still time and neglected to maintain a sufficient watch on the bridge. She was further held at fault for assuming that her own visibility was as good as that of the Proteus when she should have realized that the position of the moon [fol. 919] and her own camouflage made it difficult for her to be seen. The court held the situation to be one of passing starboard and not of meeting end on.

The fault of the Proteus is plain. We think the court below properly held her at fault. The Proteus was at fault in unnecessarily hard -porting the helm; in not announcing by signal, the extreme helm movement and in persisting at full speed ahead and hard aport helm. It was unnecessary and she was at inexcusable fault in using

the helm movement under the circumstances. (The Manitoba, 122 U. S. 97; The Atlantic City, 143 Fed. 451; The Worsley Hall and Ioannis Vatis (House of Lords, Dec. 1919) Lloyd's List Law Reports, Vol. 1, pp 607). The failure of the Proteus to sound a signal blast on the whistle to indicate her change of course to starboard was a violation of Article 28 of the rules and because it obviously operated to the detriment of the Cushing in her navigation, she cannot avoid the consequences of this wrongful manœuvre. The Proteus had swung as far as two points before the signal announcing her change of course was sounded and a minute and a half had elapsed before the one blast signal was sounded after the hard aporting. The failure to sound that signal cannot be attributed to the absence of lights on the Cushing. It was a necessary signal. She also failed to reverse her engines in the face of a known danger after discovering the close proximity of the Cushing and her course. Apparently the navigators of the Proteus were under the impression that the Cushing [fol. 920] was swinging under a starboard helm which would have necessarily brought the vessels on intersecting courses, but despite that assumption, the Proteus was continued at full speed of 13½ knots. And the officer in charge said that they did not stop or reverse "but we were trying to get out of the way." To fail to reverse the engines in the face of danger is sufficient to fasten liability upon the Proteus, to charge it with contributing to the collision. (Albert Dumois, 177 U. S. 240; The New York, 175 U. S. 187; The Volund, 181 Fed. 643.)

We think the Cushing was at fault in not flashing or setting her lights on and for failing to give the Proteus a wider birth. The officer of the Cushing reports the collision as occurring at 1:05 A. M. He says that the Proteus was under observation from 12:50 A. M. to the time of the collision. When he first sighted her, he could not determine which way she was going. He continued to observe her, however, and noted that her bearings were getting broader on his bow. The vessels at this time were at least three miles apart. The navigating officer of the Cushing by his own testimony, shows he was fully aware of the course of the Proteus. It is conceded that the speed of the two ships was, The Cushing, twelve knots per hour or twelve hundred and seventeen feet per minute; the Proteus, thirteen and a half knots or thirteen hundred and seventy feet per minute. The combined speed was therefore twenty-five hundred and eighty-seven feet per minute. [fol. 921] Accepting the estimate of the Cushing's officer of the distance of three miles, it was at least seven minutes before the collision after he knew the exact course of the Proteus. He had no right to assume that the Proteus had like knowledge with respect to the movements of the Cushing. It did not have the appearance of a starboard to starboard passing, as argued in behalf of the Cushing. In so far as the Proteus was concerned, the Cushing would appear to be almost dead ahead up to a very short interval of time before the collision. The diagrams indicate this. Any change in the bearing of the Cushing in respect to the Proteus would occur

very slowly because of the fact that the angle between the two courses was only three degrees and the Cushing had only a few minutes before it passed the point of convergence of the two courses. If the Proteus and the Cushing had been running with lights, the Proteus, up to a comparatively short time before the collision, would have been showing both side lights to the Cushing, and the Cushing would have been showing only her green lights to the Proteus. If, however, the ships had been running without lights, the observers of the Proteus would have seen the Cushing almost dead ahead, whereas the observers of the Cushing would have seen the Proteus slightly on their starboard bow. This situation should have been recognized as vessels approaching in a dangerous situation and in such case involved the risk of collision. Even with lights, it would have been a dangerous situation and, of course, one of greater danger [fol. 922] when the ships were running without lights in view of the fact that the obvious purpose of running without lights was to destroy a ship's visibility and to prevent observers on other ships from taking proper bearings. The vessels were in such a situation that those on the Proteus would, either because of the absence of light, not see the Cushing at all, or would see her dead ahead. Those on the Cushing, when they saw the Porteus, saw her on the Cushing's starboard bow, the bearings of the Proteus from the Cushing must have been much finer than that estimated by the witnesses called on behalf of the Cushing. It would seem, therefore, impossible to treat the vessels as being in a starboard to starboard situation. Under these circumstances, prudent navigation would dictate to turn away or run away in plenty of time. The Cushing, having the Proteus under observation for a period of fifteen minutes, should either have exhibited her lights or have given the Proteus a wide berth. She was not justified in assuming, as she did assume, that the situation was a starboard to starboard situation and that those on the Proteus knew that it was a starboard to starboard situation. It must always be remembered that in addition to running without lights, the Cushing was camouflaged for the purpose of deceiving observers as to her course. In the situation it was known or should have been known to her officers, that if she could have been seen, her camouflage would have given her the appearance of a privilege vessel to observers from [fol. 923] the Proteus; hence, they should have anticipated a port helm from the Proteus. When the navigating officer of the Cushing elected to hold his course, he was then under a positive duty to show his lights because he had the Proteus at his peril. If the Proteus should make him out as camouflaged, the Proteus was under the statutory duty to port her helm. To show his ligh-s, would inform the Proteus as to the true bearing and course of the Cushing. The happening of the collision speaks of the success due to the absence of lights in lowering the Cushing's visibility and that of the camouflage in deceiving observers as to her true course. The only danger to the Cushing, in showing her lights, would have been to possibly enable a submarine to determine her true course and direction. It of necessity follows that if an observer from a submarine could not

have determined the Cushing's true course and direction without the aid of lights, an observer from the Proteus could not determine her true course and direction without such aid. We think that when the Cushing's navigating officer elected to hold his course knowing that the relative positions of the Cushing and the Proteus were such that his ship would appear to be almost dead ahead of the Proteus, he created an emergency such as was contemplated by the naval authorities which required showing his lights. It is no answer to say that the navigator was fearful of submarines at the time. The value of switching on the Cushing's lights can scarcely be questioned. [fol. 924] (The Pennsylvania, 19 Wall. 125; The Allegheny and the Pomeron, 215 Fed. 859.) Had the lights been switched on when her navigator and lookout first saw the masts of the Proteus, the appearance of the green light would have warned the navigators of the Proteus of their error and they could immediately have starboarded or reversed their engines. This unquestionably would have avoided the collision, even without any aid from the Cushing. Indeed, the navigator of the Cushing recognized his duty to turn on the lights but he did so too late. There was ample sea room and we think the navigator was clearly at fault in not taking advantage of it. Had the Cushing hard aported as soon as she saw the Proteus altering her course to starboard, she would have swung to starboard at least eight points and the vessels would have gone clear by a wide margin. Likewise, the Cushing was at fault for not stopping and reversing as soon as she saw the Proteus was changing her course. No attempt was made to slow down or stop the engines. The navigator waited a minute or two and then walked to the wheel house and switched on the lights, and then he ordered the helm hard aported and finally reversed his engines. Failure to reverse until just before the collision is indicated by the log. Steam vessels must stop their engines in the presence of d. ..ger or even anticipated danger and the failure to do so has been the cause of condemnation of many vessels where collisions have occurred. (The New York, 175 U. S. 187.) She was [fol. 925] also at fault, we think, for failing to blow a whistle under the circumstances. The navigating officer admitted that he did not think the Proteus saw the Cushing. The time to have blown the alarm to give notice to the Proteus was in the early part of the fifteen minutes during which the Cushing had the Proteus under observation.

We think the evidence clearly establishes these several faults of the Cushing and that she likewise must respond in damages.

The court found the value of the Proteus to be Seven hundred and fifty thousand dollars. Error is assigned in this, by the owner of the Proteus, claiming that it has established a value of One million, two hundred and twenty-five thousand dollars. The owner of the Cushing claims the award is excessive. The Proteus was a total loss. The principle governing the computation of damages is that the sufferer by the collision which is the result of wrong-doing, whether by negligence or mistake, is entitled to restitutio in intergram. It is that, as far as practicable, the owner is to be restored to the same

pecuniary position as if no collision had taken place and where a ship is totally lost, the owner is entitled to recover the actual value and this is defined in the Admiralty Courts to be her market value, that is to say, the gross sum for which she might have been sold immediately before the collision. (Lowndes, Admiralty Law, p. 149.) This rule was announced in the early case of The Clyde, Swaby, p. 23, where it was said:

"The value is the market price at the time of the destruction of the [fol. 926] property, and the difficulty is to ascertain what would be its market value. * * * In order to ascertain this, there are various species of evidence that may be resorted to; for instance, the value of the vessel when built. But that is only one species of evidence, because the value may furnish a very inferior criterion whereby to ascertain the value at the moment of destruction. The length of time during which the vessel has been used, and the degree of deterioration suffered, will affect the original price at which the vessel was built. But there is another matter infinitely more important than this—known even to the most unlearned—the constant change which takes place in the market. It is the market price which the court looks to, and nothing else, as the value of the property. It is an old saying, 'The worth of a thing is the price it will bring.'"

This rule was cited with approval in Alaska S. S. C. v. Inland Navigation Co. (211 Fed. at 842). It has been approved by other law writers. (Roscoe on Damages in Maritime Collisions; Marsdon's Collisons at Sea, 6th Ed.; Treatise on the Law of Maritime Collisions, §200, by Spencer.) The rule was approved in Dobree v. Schroeder (2 My. & Cr. 489, the High Court of Chancery of England). In The Colorado, Fed. Cases No. 3029 (affirmed without reference to the question of damages, 91, U. S. 692) the correct rule on this subject [fol. 927] was said to be that when the vessel is a total loss, the market value of the vessel just before the collision is the proper measure of damages and that the best evidence of such value is the opinion of competent persons who knew the vessel shortly before she was lost, and that the next best evidence is the opinion of persons conversant with shipping and the transfer of vessels. It was pointed out that there were exceptions to this rule, as when a vessel lost because of some peculiarity of construction, is adopted to some special purpose out of the usual course of shipping, the owner is precluded from establishing the market value for her. In such an instance, he may show when the vessel was built for the special trade requiring the peculiar or unusual conditions in her construction, and it was said that the better criterion of that is the cost of construction of purchase price and a deduction for depreciation or ordinary wear and tear. But where the vessel is salable or where the market price may be shown, the present fair value is the test.

It is pointed out that the Proteus was owned by the Southern Pacific Railroad Company; that she had been requisitioned by the Government when the Railroad Company was taken under Federal

control, and that during this period the owner could not have sold her or would have to sell her subject to control by the Government. But when she was lost, the monetary loss to the owner was her then market value. The act of requisition was at an end and the loss that [fol. 928] of the owner. At that time, if the owner was free to sell her, there was a ready market. At this time, the market value of steamships was very high due to the war, and the courts have taken notice of such increase in value. As in the salvage case of The Kia Ora (252 Fed. 507—Fourth Circuit) and in the arbitration between the Mersey Docks and Harbour Board and the Lords Commissioners of the Admiralty (3 K. B. Div. 1920, p. 223) where Lord Reading said:

"In my judgment it is sufficient for the purposes of this case to say that the Board are entitled to have the propery which, but for the action of the Admiralty, would have been in their possession in April, 1919, replaced by the Admiralty. As it cannot be replaced except by the expenditure of money, they are entitled to the amount of money which would represent the cost to them of the replacement. That must be measured with regard to the special circumstances arising from the war, and more especially to the increase in the value of labor and materials which has continued up to the present time."

Assuming, as claimed, there was no market value in August, 1918, because such steamships could not be purchased because none were on the market or because it was difficult, if not impossible, to obtain a shipbuilder to construct one, then these special circumstances invoke the rule of damages of cost of production less depreciation.

[fol. 929] Evidence was offered on the trial in fixing the value in August, 1919, the date of the loss, of the cost of reproduction, less depreciation. The court below discounted the cost of reproduction for the reason that it regarded the high prices of 1918 as artificial and fictitious, but the high prices represent actual values. The withdrawal by the belligerents of a large part of their merchant tonnage for commercial pursuits, for war and other public uses, the chartering of neutral ships to them for like purposes, and the heavy toll of merchant ships destroyed by the submarines and other hostile attacks, and commandeering the shipyards for the construction of ships for Government purposes, all caused not only a severe shortage of tonnage available for commercial uses, but disrupted the channels of the trade and caused high prices. It resulted in high freight rates and increased tonnage values. This condition was brought about by the war, and to be sure, was not expected to survive indefinitely after the war, but there was nothing artificial or fictitious about these prices. They were brought about by unusual economic conditions. The period of high prices lasted for several years during the war period. Evidence was offered by the claimant that in 1917, a Joint Army and Navy Board, and a Board of Appraisal of Merchant Private Vessels, fixed the value of the S. S. Saratoga and the S. S. Havana at two and a half times what they cost in 1916. And in arriving at that conclusion, they estimated the cost of reproduction less depreciation.

[fol. 930] The Proteus was a steel passenger and freight steamship, equipped with triple expansion engines and Scotch boilers. Her speed was 15 knots, dimensions, 405 feet long, 48 feet beam, 32 feet 9 inches in depth. Her tonnage was 3,006 tons net; 4,836 tons gross and about 4,000 tons dead weight. She was built in 1900 by the Newport News Shipbuilding Company for use in the Southern Pacific Railroad Company's service between New York and New Orleans, and was so used until taken over by the Government. Her original cost was $557,600. In 1909 she was reboilered and otherwise improved at a cost of $90,000. She was unusually well kept as the court below found. Three experts, one a surveyor and appraiser of thirty-five years' experience, and the other two the presidents of two of the largest steamship companies in the Unied States, gave values for the vessel for August, 1918, which justified the claim of $1,225,000. This made due allowance of two and a half per cent per year for depreciation. There is no fixed rule as to the amount of depreciation to be deducted, but two and a half per cent is reasonable in application for a period when there was such demand for vessels. Obviously, it might be unreasonable in other periods. The rule has varied between three and five per cent for depreciation in tax matters. The Treasury Department bulletin of January-June, 1920, fixed two per cent as the rate of depreciation on steamships. Two and a half per cent is said by the experts to be used here because of the unusual high standard of upkeep of the Proteus.

[fol. 931] Opposed to this testimony is that of an employe of the owner of the Cushing, connected with the construction department. Another, who was a member of the Board that appraised the Havana and Saratoga at two and a half times its value at the time of construction. The third expert who seems to have had nothing to do with the valuation of merchant ships but who was engaged in the construction of yachts and torpedo boats. We think the greater weight of persuasive testimony favors the proof offered on behalf of the Proteus as to the value and that the rate of depreciation was fair and reasonable under all circumstances. The valuation fixed for the Proteus as of August 1, 1918, is at twice her original cost, whereas the valuation fixed by the witnesses called by the petitioner is about one-fifth to one-sixth more than her original cost. We are convinced that the valuation fixed by the court below was inadequate and that convincing testimony requires our accepting the value claimed by the owner of the Proteus.

The decree is modified by holding the value of the Proteus at $1,225,000.00 and as thus modified it is affirmed.

Decree modified.

[fol. 932] In United States Circuit Court of Appeals

In the Matter of the Petition of Standard Oil Company of New Jersey, as Owner of the Steamship "Cushing" for Limitation of Liability; Standard Oil Company of New Jersey, Southern Pacific Company, Appellants

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed July 23, 1923

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of [fol. 933] New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is modified in accordance with the opinion of this court, and as modified, affirmed, with costs of this court to the cargo owners and to the owner of the "Proteus".

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R., M. T. M.

[File endorsement omitted.]

[fol. 934] In United States Circuit Court of Appeals

Clerk's Certificate

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit do hereby Certify that the foregoing pages, numbered from 1 to 933 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of the Petition of the Standard Oil Company of New Jersey as owner of the Steamship Cushing, for limitation of liability; Standard Oil Company of New Jersey, Southern Pacific Company, Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day of October in the year of our Lord One Thousand Nine Hundred and Twenty Three and of the Independence of the said United States the One Hundred and Forty eighth.

Wm. Parkin, Clerk. [Seal of United State Circuit Court of Appeals, Second Circuit]

[fol. 935] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

ORDER ALLOWING PETITION FOR CERTIORARI

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

November 12, 1923.

[fol. 936] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

On Writ of Certiorari to the United States Circuit Court of Appeals for Second Circuit

ORDER FOR OMISSION OF PARTS OF RECORD

On consideration of the motions (1) that the order of this Court on November 12, 1923, granting a petition for a writ of certiorari be restricted to the respondents Southern Pacific Company and Director General of Railroads, and be vacated as to the personal injury, cargo, and passenger claimants against whom no error is assigned in the petition; and/or (2) that the transcript of record be diminished by at least 500 pages so as to include only evidence bearing directly or indirectly on the errors of law assigned in the petition and brief for certiorari,

It is now here ordered by this court that the said motions be, and the same are hereby, granted.

November 26, 1923.

[fol. 937] IN SUPREME COURT OF UNITED STATES

DESIGNATION OF PARTS OF RECORD TO BE OMITTED PURSUANT TO ORDER OF NOV. 26, 1923

New York, November 28, 1923.

William R. Stansbury, Esq., Clerk U. S. Supreme Court, the Capitol, Washington, D. C.

Attention Mr. J. R. Robertson

No. 607, October Term, 1923, Standard Oil Co. (N. J.) vs. Southern Pacific Company and Director General of Railroads

DEAR SIR: Referring to your letter of November 17th, as you know a motion was presented to the Court in the above entitled case on Monday, November 26th, for severance of certain cargo interests, and for reduction of the record. The motion was granted.

After the presentation of the motion, the writer, who represents the Standard Oil Company in the action, and Mr. Catesby Jones, who represents the cargo interests seeking a severance, conferred with Mr. J. R. Robertson concerning the record. Mr. Robertson requested that we notify him what pages would be delted under the motion. It has been agreed that the following pages of the present record be deleted from the record for the Supreme Court:

[fol. 938] Pages 22 to 32 inclusive, folios 64-96, Vol. I; and,

Pages 55 to 508 inclusive, folios 163-1524, Vol. I.

This will necessitate remodeling of the index, and of the list of exhibits; also, there will probably be certain exhibits to be printed which are involved in the remainder of the text, and which are yet to be decided upon. As it is desirable that the order for severance and reduction of the record should be entered as soon as may be convenient, so that payment may be made to the cargo interests, we hope that the foregoing information will be sufficient for present purposes. We shall then let you know our conclusions as to what additional printing is to be done.

In this connection, it is our purpose to move the court for leave to take further testimony as was indicated in the petition for writ of certiorari. It will be very much appreciated if you will let us have your views as to whether or not that motion should be made prior to final printing of the Supreme Court record, or whether the record should be printed and later leave obtained to add a supplemental record if the motion should be granted to take the additional testimony desired.

We shall be obliged for any suggestions which you may have [fol. 939] to make on this latter point.

Very truly yours,
Kirlin, Woolsey, Campbell, Hickox & Keating, by W. H. McGrann.

McG.MB.
9093

Copy to Charles C. Burlingham, Esq., Attorney for Southern Pacific Company and Director General of Railroads.
Copy to T. Catesby Jones, Esq., Attorney for cargo interests.

[Endorsed:] 29,917. Kirlin, Woolsey, Campbell, Hickox & Keating. Dec. 1, 1923.

[File endorsement omitted.]

Return of Commissioner to Order to Take Testimony

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 197

STANDARD OIL COMPANY OF NEW JERSEY, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

FILED JULY 28, 1924

(29,917)

(29,917)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 197

STANDARD OIL COMPANY OF NEW JERSEY, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 3, 1924

[fol. 1] **IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923**

No. 607

STANDARD OIL COMPANY (NEW JERSEY), Petitioner,

against

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads, Respondent

COMMISSIONER'S CERTIFICATE AND STIPULATION RE RETURN

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, the Commissioner appointed by order of May 5, 1924 herein, do hereby certify that annexed hereto are true copies of the interrogatories addressed to the witnesses herein and of the answers made by said witnesses, the originals of which have heretofore been certified to the Supreme Court, the interrogatories and answers in this copy being so arranged that each interrogatory is followed by its appropriate answer. This certification is made pursuant to the stipulation of counsel hereto annexed.

New York, July 24th, 1924.

Wm. Parkin, Commissioner.

[fol. 2] [Title omitted]

It is stipulated by and between the counsel for the respective parties hereto that Honorable William Parkin, Commissioner appointed to take evidence herein in this Court, having already certified on or about July 15th, 1924, to the Court the answers of the witnesses to whom interrogatories were addressed by him under the order of this Court made and entered May 5, 1924, may prepare and certify the depositions in question and answer form so that each question is followed immediately by its appropriate answer in order that the printed record containing the depositions taken under the said order may be in convenient form for the Court.

Dated, July 16, 1924.

John M. Woolsey, Counsel for Petitioner. Charles C. Burlingham, Counsel for Respondent.

[fol. 3] [Title omitted]

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, the Commissioner designated by order made herein to take the testimony of certain witnesses upon interrogatories and cross interrogatories, do hereby certify that the interrogatories hereto annexed were filed with me by the petitioner on or before June 1st, 1924, but that no cross interrogatories have been filed by or on behalf of the respondents—that pursuant to said order I have caused the said witnesses to appear before me at the places and at the times set forth in their depositions; that said witnesses having first been duly sworn to testify the truth, the whole truth and nothing but [fol. 4] the truth, did depose to the matters contained in the annexed depositions, and that I have subscribed my name to each half sheet thereof and to each exhibit.

New York, July 15th, 1924.

Wm. Parkin, Commissioner.

[fol. 5] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER TO TAKE ADDITIONAL TESTIMONY

On consideration of the motion of the petitioner for leave to take additional testimony herein,

It is now here ordered by this court that the said motion be, and the same is hereby, granted, such additional testimony to be taken in accordance with Rule 12, Paragraph 2, of the Rules of this Court; to be limited to the subject matter specified in the motion, and to be upon interrogatories presented and served upon the opposite party by the petitioner on or before the first day of June next, and upon cross-interrogatories to be filed on or before the twentieth day of June next. The interrogatories and cross-interrogatories and the evidence taken shall be forwarded to this Court on or before the first day of September next.

It is further ordered that William Parkin, Esquire, Clerk of the United States Circuit Court of Appeals for the Second Circuit, be, and he is hereby, designated the Commissioner to take and return [fol. 6] the additional testimony in this cause in accordance with this order.

It is further ordered that the costs of this Commission, when incurred, shall be paid by the petitioner.

May 5, 1924.

A true copy.

Test:

Wm. R. Stansbury, Clerk of the Supreme Court of the United States. Seal.

[fol. 7] Depositions of witnesses produced, sworn and examined, the 26th day of June, in the year one thousand nine hundred and twenty-four, at New York City, under and by virtue of an order issued out of the Supreme Court of the United States, in a certain cause therein depending and at issue, wherein Standard Oil Company (New Jersey) is petitioner and Southern Pacific Company and James C. Davis, Director General of Railroads, are respondents, as follows:

JULIUS KRUTTSCHNITT, of New Canaan, Connecticut, Chairman of Executive Committee of Southern Pacific Company, aged seventy years and upwards, being duly and publicly sworn and examined on the part of the petitioner, doth depose and say as follows:

First. State your name, age, residence and present occupation.

First. To the first interrogatory he saith: My name is Julius Kruttschnitt; age seventy years; residence New Canaan, Connecticut; present occupation, Chairman of Executive Committee of Southern Pacific Company, and chairman of the Executive Committees of the various railroad companies included in the agreement with the Director General of Railroads hereafter produced.

Second. What position or positions did you occupy between Aug-
[fol. 8] ust 1, 1918 and August 1, 1924:

Second. To the second interrogatory he saith: I occupied the same positions on August 1, 1918, and continuously up to the present time.

Third. At or about the time when, or at some time after, the Railroad Administration took over the properties of the Southern Pacific Company and its subsidiaries in pursuance of the Act of Congress of August 26, 1916, Chapter 418, Paragraph 1, 39 Stats. 645, and of the proclamation of the President of December 16, 1917, was there an agreement in writing entered into by and between the Southern Pacific Company and/or its subsidiaries with the United States?

Third. To the third interrogatory he saith: There was such an agreement in writing entered into, pursuant to Federal Control Act of March 21, 1918.

Fourth. If you answer the third interrogatory in the affirmative, will you please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause?

Fourth. To the fourth interrogatory he saith: This is a true copy of the agreement.

(Copy of agreement above referred to handed to the Commissioner and marked Exhibit 1.)

Fifth. After the loss of the steamship Proteus whilst in possession of the Director General of Railroads, were there any negotiations
[fol. 9] had between the Director General of Railroads and the Southern Pacific Company in connection with a payment to the Southern Pacific Company by or in behalf of the Director General of Railroads for the loss of the Proteus?

Fifth. To the fifth interrogatory he saith: I have no personal knowledge upon which to base an answer to the fifth interrogatory. Up to the end of Federal control, say March 1, 1920, the interests of the Southern Pacific Co. in connection with the loss of the S. S. Proteus were looked after by Mr. L. J. Spence, Director of Traffic of Southern Pacific Company, acting under the advice and with the assistance of the Company's General Counsel, J. P. Blair. After the end of Federal control the matter of the loss of the Proteus was merged in the matter of all claims against the Director General of Railroads on the part of the Southern Pacific Company and its proprietary lines, growing out of Federal control, under the contract with the Director General. The handling of such claims was in the charge of Mr. A. D. McDonald, Controller of Southern Pacific Company, who was assisted and advised by the above named general counsel. I have no personal knowledge of what, if any negotiations were conducted by the above named officers respecting payment for the S. S. Proteus. Since the receipt of these interrogatories I have [fol. 10] asked them for information respecting the subject matter of interrogatory fifth. I shall accordingly make two answers, one on my personal knowledge, and one on information received as above stated.

On my personal knowledge, my answer is, I do not know.

On information received, my answer is, no. The nearest approach to such negotiations was a letter dated December 17, 1919, written by Mr. L. J. Spence to Mr. E. R. Richardson, the Federal Manager, for the Director General of Railroads, of Coastwise Steamship Lines under Federal control, including the Southern Pacific's steamship, and a reply to such letter by Mr. Richardson of February 17, 1920. True copies of these letters are now produced and handed to the Commissioner. After such interchange of letters the matter of settlement for loss of the Proteus was left to be included in general settlement. See my answer to interrogatory twenty-sixth.

(The letter above referred to dated December 17, 1919 was marked Exhibit 2; and the letter dated February 18, 1920 was marked Exhibit 3.)

Sixth. If you answer the preceding interrogatory in the affirmative, state when these negotiations began and by whom they were conducted on behalf of the Director General of Railroads and on behalf of the Southern Pacific Company?

[fol. 11] Sixth. To the sixth interrogatory he saith: See my answer to interrogatory fifth.

Seventh. Were any of these negotiations in writing in the form of letters, telegrams or other writings?

Seventh. To the seventh interrogatory he saith: See my answer to interrogatory fifth.

Eighth. If you answer the preceding interrogatory in the affirmative, please produce true copies of any letters, telegrams, or other writings exchanged between the Director General of Railroads and/or any of his agents or employees, and the Southern Pacific Company and/or any of its agents or employees, in connection with such

negotiations, and hand them to the Commissioner to be marked and used as exhibits in this cause.

Eighth. To the eighth interrogatory he saith: I have already handed you letters dated December 17, 1919 and February 18, 1920, in relation to my answer to interrogatory fifth.

Ninth. If you state that there were negotiations had, as asked in the Fifth, Sixth, Seventh and Eighth Interrogatories, will you state whether, as a result of those negotiations, there was any agreement reached as to the amount which should be paid by the Railroad Administration to the Southern Pacific Company for the loss of the Proteus?

Ninth. To the ninth interrogatory he saith: I do not know of [fol. 12] my personal knowledge. From information received no such agreement was ever reached.

Tenth. If you answer the Ninth Interrogatory in the affirmative, will you please state when such an agreement was reached and what amount the Director General of Railroads agreed to pay to the Southern Pacific Company for the loss of the Proteus?

Tenth. To the tenth interrogatory he saith: I have not answered the ninth interrogatory in the affirmative.

Eleventh. Was there any written contract entered into by and between the Director General of Railroads and the Southern Pacific Company embodying the agreement mentioned in the Ninth and Tenth Interrogatories?

Eleventh. To the eleventh interrogatory he saith: No.

Twelfth. If you answer the Eleventh Interrogatory in the affirmative, please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

Twelfth. To the twelfth interrogatory he saith: I have not answered the eleventh interrogatory in the affirmative.

Thirteenth. If there was not any formal written agreement, please produce any letters, telegrams, or other documents or writings which may have embodied the final agreement by and between the Director General of Railroads and the Southern Pacific Com- [fol. 13] pany as to the amount which was to be paid for the loss of the Proteus.

Thirteenth. To the thirteenth interrogatory he saith: See my answer to interrogatory fifth.

Fourteenth. If you answer the Ninth and Tenth Interrogatories in the negative, state whether or not an item representing the amount to be paid for the loss of the Proteus appeared in any schedule of items embodied in any general settlement between the Director General of Railroads and the Southern Pacific Company?

Fourteenth. To the fourteenth interrogatory he saith: Upon my personal knowledge I answer, I do not know. Upon information received as above explained, I answer, no.

Fifteenth. If you answer the Fourteenth Interrogatory in the affirmative, state the amount of the item representing the amount to be paid for the loss of the Proteus.

Fifteenth. To the fifteenth interrogatory he saith: I have not answered the fourteenth interrogatory in the affirmative.

Sixteenth. If you state an amount in answer to the Ninth and Tenth Interrogatories and/or in answer to the Fourteenth and Fifteenth Interrogatories which fixed the amount of payment to be made for the loss of the Proteus, state whether or not that amount included interest from the date of the loss, and if it did, whether [fol. 14] any other or further payment was made on account of interest on the said amount.

Sixteenth. To the sixteenth interrogatory he saith: I have not stated an amount in answer to either the ninth or tenth or fourteenth or fifteenth interrogatories.

Seventeenth. If in answer to the Ninth and Tenth Interrogatories and/or the Fourteenth and Fifteenth Interrogatories, you have stated an amount agreed to be made as a payment for the loss of the Proteus,

(a) State whether or not in arriving at that amount you took into consideration the value of the Proteus which had been fixed by the Commissioner and by the United States District Court for the Southern District of New York in this litigation?

(b) If you did not take into consideration the value of the Proteus fixed by the Commissioner and the said United States District Court in this case, will you state on what you based the amount which was agreed on to be paid by the Director General of Railroads to the Southern Pacific Company for the loss of the Proteus.

Seventeenth. To the seventeenth interrogatory he saith: I have not stated in answer to the ninth or tenth or fourteenth or fifteenth interrogatories an amount agreed to be paid as a payment for the loss of the Proteus.

Eighteenth. Was the agreed amount to be paid for the loss of the [fol. 15] Proteus ever paid by the Director General of Railroads to the Southern Pacific Company?

Eighteenth. To the eighteenth interrogatory he saith: See answer to interrogatory seventeenth.

Nineteenth. If you answer the Eighteenth Interrogatory in the affirmative, will you state the date of this payment, the total amount thereof, and the person to whom it was made?

Nineteenth. To the nineteenth interrogatory he saith: See answer to interrogatory seventeenth and eighteenth.

Twentieth. Was there any final written agreement of settlement made between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other?

Twentieth. To the twentieth interrogatory he saith: Yes, there was a final written agreement of settlement between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other. I produce and hand to the Commissioner a true copy of such agreement of settlement.

Twenty-first. If you answer the Twentieth Interrogatory in the affirmative, will you state when this final agreement of settlement was made and by whom it was signed on behalf of the several parties?

Twenty-first. To the twenty-first interrogatory he saith: The agreement was signed by James C. Davis, Director General, by myself as

[fol. 16] Chairman of the Executive Committee of the Southern Pacific Company, by Hugh Neill, Secretary of the Southern Pacific Company and Assistant Secretary of subsidiary companies, and by A. D. McDonald, Controller. It was negotiated by myself and Mr. McDonald, with the assistance and advice of our above named general counsel. I participated at only one session of the negotiations.

Twenty-second. If you state there was such an agreement, will you please produce a true copy thereof and hand it to the Commissioner to be marked as an exhibit and used in this cause?

Twenty-second. To the twenty-second interrogatory he saith: See answer to interrogatory twentieth.

(The agreement of settlment referred to was marked Exhibit 4.)

Twenty-third. If it is a fact that there was a lump sum settlement made by and between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other, will you state what the amount of that lump sum settlement was and what was allowed in such lump sum settlement on account of the loss of the steamship Proteus?

Twenty-third. To the twenty-third interrogatory he saith: It is a fact that there was a lump sum settlement made by and between [fol. 17] the Director General on the one hand and the Southern Pacific Company and its subsidiary companies on the other. Such lump sum amounted to $9,250,000. I do not know what, if anything was allowed in such lump sum settlement on account of the loss of the steamship Proteus. The lump sum was offered to us in settlement, and being the best offer we could obtain we accepted it. It was many million dollars less than the aggregate of the claims of the Southern Pacific Company and its subsidiaries. We do not know upon what principle our claim was scaled or eliminated.

Twenty-fourth. In pursuance of the final settlement, were there any releases exchanged by and between the Railroad Administration and the Southern Pacific Company and its subsidiary companies?

Twenty-fourth. To the twenty-fourth interrogatory he saith: The agreement produced in answer to interrogatory twentieth contains all the releases, if any, exchanged between the parties.

Twenty-fifth. If you answer the Twenty-fourth Interrogatory in the affirmative, will you please produce and hand to the Commissioner to be marked and used as exhibits a true copy or copies of any and all such releases?

Twenty-fifth. To the twenty-fifth interrogatory he saith: I have [fol. 18] not answered the twenty-fourth interrogatory in the affirmative.

Twenty-sixth. (a) Were there any oral negotiations on the subject of the value of the Proteus?

(b) If so, where did they occur and between what persons were they held?

Twenty-sixth. To the twenty-sixth interrogatory he saith: I participated in no oral negotiations on the subject of the value of the Proteus. I know of no such negotiations, except that I am informed

that a discussion took place between Mr. McDonald, Controller, and others representing the Southern Pacific and Mr. Frank C. Wright, who represented the Director General, concerning claims of the Director General and of the Southern Pacific Company growing out of the operation by the Director General of the steamship lines of the Southern Pacific Company. I am informed that in the course of these negotiations the value of the Proteus was discussed, that no final agreement was reached respecting the subject matter of the negotiations.

Twenty-seventh. (a) During the negotiations was either the Director General of Railroads or the Southern Pacific Company represented by any lawyer?

(b) If so, what was the name of the lawyer representing the Director General of Railroads and what was the name of the lawyer representing the Southern Pacific Company?

(c) If you state that there were lawyers and give their names, [fol. 19] will you please state to what firm or firms the said lawyers belonged?

Twenty-seventh. To the twenty-seventh interrogatory he saith: If by "negotiations" is meant the negotiations referred to in answer to interrogatory twenty-sixth, the Southern Pacific Company was represented by its said general counsel, who is not a member of any law firm. My information is that the Director General was not then represented by any counsel.

If by "negotiations" is meant the negotiations for a settlement of all claims of the Southern Pacific Company or its subsidiaries arising out of Federal control, the Southern Pacific Company was represented therein by its said general counsel, and the Director General was represented by one Smith, who was then his general counsel.

Twenty-eighth. Did the Southern Pacific Company receive any letters from counsel for the Director General of Railroads regarding any negotiations for settlement of the loss of the Proteus?

Twenty-eighth. To the twenty-eighth interrogatory he saith: None that I know of or have any information about.

Twenty-ninth. If it did, will you please produce a true copy of such letter or letters and hand them to the Commissioner to be marked and used in this cause?

Twenty-ninth. To the twenty-ninth interrogatory he saith: See [fol. 20] my answer to interrogatory twenty-eighth.

Thirtieth. If there are within your knowledge any other facts or circumstances or writing on connection with said agreement on the amount which was paid for the loss of the Proteus or the actual payment made by the Director General for the loss of the Proteus, about which you have not been specifically interrogated in the foregoing interrogatories, state fully such facts and circumstances as are within your knowledge and produce any such writings to be marked by the Commissioner and used as exhibits herein.

Thirtieth. To the thirtieth interrogatory he saith: No.

There were no cross-interrogatories.

Julius Kruttschnitt.

Examination taken, reduced to writing and by the witness subscribed and sworn to, this 27th day of June, 1924 before Wm. Parkin, Commissioner.

[fol. 21] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 607

STANDARD OIL COMPANY (NEW JERSEY)

against

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads

EXHIBIT 1 TO TESTIMONY OF J. KRUTTSCHNITT

At the execution of a Commission for the examination of witnesses, wherein Standard Oil Company (New Jersey) is petitioner and Southern Pacific Company and James C. Davis, Director General of Railroads are respondents, this paper writing was produced and shown to Julius Kruttschnitt and by him deposed unto at the time of this examination and marked Exhibit 1 before

Wm. Parkin, Commissioner.

Agreement Between the Director General of Railroads and the Southern Pacific Company and Other Corporations, February 19, 1919

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[fol. 23] Preamble and Recitals

This agreement, made this nineteenth day of February, 1919, between Walker D. Hines, Director General of Railroads, hereinafter called the Director General, acting on behalf of the United States

and the President, under the powers conferred by the proclamations of the President hereinafter referred to, party of the first part, and the Southern Pacific Company, a corporation duly organized under the laws of Kentucky; the Arizona Eastern Railroad Company, a corporation duly organized under the laws of Arizona and New Mexico; the Houston and Texas Central Railroad Company, The Galveston, Harrisburg and San Antonio Railway Company, the Texas and New Orleans Railroad Company, The Houston East and West Texas Railway Company, corporations duly organized under the laws of Texas; the Houston and Shreveport Railroad Company, Morgan's Louisiana and Texas Railroad and Steamship Company, the Louisiana Western Railroad Company, Lake Charles and Northern Railroad Company, Iberia and Vermilion Railroad Company, corporations duly organized under the laws of Louisiana, parties of the second part:

Witnesseth that—

(a) Whereas by a proclamation dated December 26, 1917, the President, acting under the powers conferred on him by the Constitution and laws of the United States, by the joint resolutions of the Senate and House of Representatives bearing date April 6 and December 7, 1917, respectively, and particularly under the powers conferred by section 1 of the act of Congress approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," took possession and assumed control at 12 o'clock noon on December 28, 1917, of certain railroads and systems of transportation, including the railroads and transportation systems of the Companies and the appurtenances thereof, and directed that the possession, control, operation, and utilization of the transportation systems thus taken should be exercised by and through William G. McAdoo, appointed Director General of Railroads; and

(b) Whereas the Congress of the United States, by an act approved March 21, 1918, hereinafter called the Federal control act, has authorized the President to enter into agreements with the companies owning the railroads and systems thus taken over for the maintenance and upkeep of the same during the period of Federal control, for the determination of the rights and obligations of the parties to the agreement arising from or out of Federal control including the compensation to be received or guaranteed, and for other purposes, as in said act more fully set out, and authorized the President to exercise any of the powers by said act or theretofore granted him with relation to Federal control through such agencies as he might determine; and

(c) Whereas by a proclamation dated March 29, 1918, the President, acting under the Federal control act and all other powers him thereto enabling, authorized the Director General either personally or through such divisions, agencies, or persons as he may appoint, and in his own name or in the name of such divisions, agencies, or persons, or in the name of the President, to agree with the carriers,

or any of them, or with any other person in interest, upon the amount of compensation to be paid pursuant to law, and to sign, seal, and deliver in his own name or in the name of the President or in the name of the United States such agreements as may be necessary and expedient with the several carriers or other persons in interest respecting compensation, or any other matter concerning which it may be necessary or expedient to deal, and to make any and all contracts, agreements, or obligations necessary or expedient and to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular the acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject thereof, the President is authorized to do and perform; and

(d) Whereas the said William G. McAdoo has resigned as Director General of Railroads and by a proclamation dated January 10, 1919, the President appointed Walker D. Hines Director General of Railroads and authorized him, either personally or through such divisions, agencies or persons as he may appoint, in his own name or in the name of such divisions, agencies, or persons, or in the name of the President, to agree with the carriers or any of them or with any other person in interest, upon the amount of compensation to be paid pursuant to law, and to sign, seal and deliver in his own name or in the name of the President or in the name of the United States of America such agreements as may be necessary and expedient with the carriers or other persons in interest respecting compensation, or any other matter concerning which it may be necessary or expedient to deal, and to make any and all contracts, agreements or obligations necessary or expedient and to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of the systems of transportation taken over by the proclamation of December 26, 1917, as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties in relation to such Federal control as the President is by law empowered to do and perform; and

(e) Whereas the Interstate Commerce Commission has certified to the President the amount of the average annual railway operating incomes of the said Companies, computed in the manner provided in section 1 of the Federal control act, and the aggregate of which amounts is forty-seven million five hundred and fifty-nine thousand nine hundred and eighty-eight dollars, and ninety-one cents ($47,559,988.91), subject to such changes and corrections as the Commission may hereafter determine and certify to be requisite in order that the accounts and reports of the Companies used by the Commission as the basis of computing said average annual

railway operating incomes may be brought into conformity with the accounting rules or regulations of the Commission in force at the time of such accounting, or in order to correct computations based on such accounts or reports; and

(f) Whereas the sum hereinabove mentioned in paragraph (e) includes the railroad operating income of the Southern Pacific Railroad for the line between the international boundary at Cantu and Aras Junction, Arizona, a distance of 2.7 miles, which line is not included in this contract, and the railway operating income of said line is estimated at ninety dollars and eighty-three cents ($90.83); and

(g) Whereas during the test period the Company operated a line of steamships between New York and Galveston and other ports in the Gulf of Mexico as a part of a combined rail and water system of transportation between New York, said Gulf port, and its rail terminals in Oregon and California; and whereas certain steamships and other vessels (namely, El Cid, El Dia, El Rio, El Ciglio, El Oriente, El Occidente, El Sol and Topila) belonging to the Company and used by it during the test period in connection with its system of transportation were between June 30, and December 28, 1917, requisitioned by the United States Government, except the Occidente which was taken May 30, 1917, and were on December 28, 1918, under charter to the War Department or the Navy Department; another of said ships (the Antilles) was destroyed between June 30, 1917, and December 28, 1917; another ship (El Capitan) was acquired by the Company subsequently to June 30, 1917, was not in operation during the test period, and was chartered to the War Department before December 28, 1917; and two other ships (El Almirante and Torres) were acquired after June 30, 1917, were not in operation during the test period, but were in use by the Company on December 28, 1917, and January 1, 1918, as a part of its transportation system; and whereas the aforesaid ships chartered to the War and Navy Departments were, prior to December 28, 1917, diverted to other uses and were in part employed for the transportation of troops, munitions and supplies across the Atlantic Ocean; and whereas these facts have given rise to doubts as to which, if any, of [fol. 24] the aforesaid ships under charter to the Government December 28, 1917, were taken over by the proclamation of the President referred to in paragraph (a) of this Preamble, as to whether the Director General is during Federal control entitled to the charter hire of these ships, and as to the equitable method of adjusting the annual compensation to be paid during Federal control for the Company's ships as a whole; and whereas in order to compose these doubts it has been agreed by the parties hereto that all the ships belonging to the Company on December 28, 1917, whether then under charter to the Government or not, shall be considered to have been taken over by the President and to be included in the property of which the Director General is to have (subject to the rights of the War and Navy Departments under said charter-parties) the

use, possession, control, and operation during Federal control, that as to the ships under charter the Director General shall during Federal control receive the charter hire, and that the Company shall during Federal control receive the sum of four hundred thousand dollars ($400,000) as annual compensation in addition to the Company's standard return.

Now, therefore, the parties hereto, of the first and second parts, respectively, each in consideration of the agreements of the other herein contained, do hereby covenant and agree to and with each other as follows:

Section 1—Privity, Alterations, Definitions, etc.

Sec. 1. (a) This agreement shall be binding upon the United States, the Director General and his successors, and upon the Companies, and their respective successors and assigns.

Wherever in this agreement the word "Company" is used, it shall be understood as meaning the Southern Pacific Company; the words "Affiliated Companies" shall be understood as meaning the ten other corporations, parties to this agreement; and the word "Companies" shall be understood as meaning the eleven corporations, parties to this agreement.

The rights and obligations of the Companies in this agreement contained are several, not joint. The Company owns all the stock, except directors' qualifying shares, of all the Affiliated Companies, except as follows:

(1) Of a total outstanding issue of 270,844 shares of The Galveston, Harrisburg & San Antonio Railway Company it is the owner of record of 270,661; the owners of the remaining 183 shares being unknown and stock certificates not traceable.

(2) Of a total outstanding issue of 100,000 shares of the Houston & Texas Central Railroad Company it is the owner of record of 99,993.

(3) Of a total outstanding issue of 4,000 shares of the Houston & Shreveport Railroad Company it is the owner of record of 3,976.

This agreement shall not be construed as creating any right, claim, privilege, or benefit against any party hereto in favor of any State or any subdivision thereof, or of any individual or corporation other than the parties hereto.

(b) The provisions of this agreement may be altered, amended, or added to by and only by mutual consent signified by instruments in writing signed by the Director General and by some officer of the Company thereto duly authorized by the Board of Directors of the Company.

(c) Wherever in this agreement the word "Commission" is used it shall be understood as meaning the Interstate Commerce Commission, acting by divisions or otherwise as authorized by law; but any

party shall have the right to have the decision of any division reviewed by the Commission sitting as a whole.

(d) Wherever in this agreement the words "Federal control" are used to indicate a period of time, they shall be understood as meaning the period from 12 o'clock midnight of December 31, 1917, to and including the day and hour on which said control shall cease.

(e) Wherever in this agreement the words "test period" are used, they shall be understood as meaning the period between July 1, 1914, and June 30, 1917, both inclusive.

(f) Wherever in this agreement the words "Standard return" are used, they shall be understood as meaning average annual railway operating income, computed in the manner provided in section 1 of the Federal control act, and ascertained and certified by the Commission.

(g) Wherever in this agreement the words "Director General" are used, they shall be understood as designating the person who has been or may from time to time be appointed by the President to exercise the powers conferred on him by law with relation to Federal control, or such agents or agencies as the Director General may from time to time appoint for the purpose; and wherever by this agreement any notice is to be given by the Director General, the same may be given in his name by any subordinate thereto duly authorized.

(h) Wherever the property of any of the Companies is referred to in this agreement it shall be understood as including all the property of that Company described in paragraph (a) of section 2 hereof, whether owned by or leased to that Company, and, where the context permits, all additions or betterments thereto or extensions thereof made during Federal control; and as to all such leased property the Companies shall have the benefit of and be subject to all the obligations and provisions of this agreement and shall be subject to all duties imposed by law in respect of such leased property.

(i) The descriptive words at the heads of the several sections of this agreement and the table of contents are inserted for convenience merely, and are not to be used in the construction of the agreement.

(j) "Railway," "railway property," "railway operation," "railway revenue and expenses," wherever used in this agreement shall, unless from the context a contrary intent plainly appears, be deemed to include the water lines or water craft of any of the Companies whose system of transportation includes water lines or water craft.

[fol. 25] Section 2—Property Taken Over

Sec. 2. The railroads and systems of transportation of the Company and of its said Affiliated Companies of which the President has taken over possession, use, control, and operation shall be considered as including:

(a) The following roads and properties:

1. The combined rail and water system of transportation of the Southern Pacific Company, consisting of railroads, steamships and other water craft, viz: the lines of railroad owned or leased, and operated, by the Southern Pacific Company, extending from Portland, Oregon, and Ogden, Utah, to San Francisco and Los Angeles, California, Yuma and Nogales, Arizona, Deming, New Mexico, and the New Mexico-Texas State line, traversing the States of Oregon, Utah, Nevada, California, Arizona and New Mexico, with branch lines to various points in said States, but not including two and seven-tenths miles of line between the international boundary at Cantu and Araz Junction, Arizona; also the passenger ferry steamers Alameda, Berkeley, El Capitan, Melrose, Oakland, Piedmont, Santa Clara, Thoroughfare, Bay City, Encinal, Garden City, and Newark, connecting San Francisco, California, with the above described lines of railroad at Oakland and Alameda, California; the river steamers, Apache, Cherokee, Iroquois, Modoc, Navajo, and steam barge Fruto, operating between San Francisco and Sacramento, California; the car transfer steamers Solano and Contra Costa; the tugs Ajax, Rival and Flyer; and all cars floats, dredges, pile drivers, launches and scows operated in connection with the system of transportation hereinbefore described.

Also the ocean steamships owned and operated by the Southern Pacific Company under the name of Southern Pacific Co.—Atlantic Steamship Lines—Morgan Line, and under the name of Southern Pacific Co.—Atlantic Steamship Lines—Havana Line, described as follows:

Passenger and freight steamers, Chalmette, Comus, Creole, Excelsior, Momus, Proteus; freight steamers, El Alba, El Almirante, El Capitan, El Cid, El Dia, El Mar, El Monte, El Mundo, El Norte, El Occidente, El Oriente, El Paso, El Rio, El Siglo, El Sol, El Sud, El Valle; oil tank steamers Topila and Torres; tugs El Amigo, El Chico, El Rey; steam barges Manhattan and Despatch; and sixty barges operated in connection therewith, including all rights in and to the use of wharves, docks, and water front terminals used in connection with the operations of said fleet at New York, New York, Galveston, Texas, New Orleans, La., and Havana, Cuba; and all other equipment and appurtenances commonly used upon or operated as a part of the Company's system of water transportation between the port of New York, and the port of Galveston, between the port of New York and the port of New Orleans, and between the port of New Orleans and the port of Havana, Cuba.

2. The railroad of the Arizona Eastern Railroad Company, including the railroad of the Phœnix & Eastern Railroad Company, which is under lease to the Arizona Eastern Railroad Company, extending from Phœnix, Arizona, to Hassayampa, to Maricopa, to Winkleman; from Bowie to Live Oak; and from Cochise to Kelton and Gleason—all in the State of Arizona—with branch lines extending to various points in said State.

3. The railroad of the Houston and Texas Central Railroad Company, extending from Houston, Texas, to Denison, Fort Worth, Ross, Lampasas, Llano, Flatonia, and Stella, all in the State of Texas, with branch lines to various points in said State.

4. The railroad of The Galveston, Harrisburg & San Antonio Railway Company, extending from Galveston and Houston, Texas, to the New Mexico-Texas State line, to Eagle Pass, Beeville, Port Lavaca, Lagrange, Matagorda Bay, and Hawkinsville, all in the State of Texas, with branch lines to various points in said State.

5. The railroad of the Texas and New Orleans Railroad Company, extending from Houston, Texas, to Echo, to Sabine Pass, and to Dallas, all in the State of Texas, with branch lines extending to various points in said State.

6. The railroad of The Houston, East and West Texas Railway Company, extending from Houston in the State of Texas to Logansport in the State of Louisiana.

7. The railroad of the Houston and Shreveport Railroad Company, extending from Logansport in the State of Louisiana to Shreveport in the same State.

8. The railroad of Morgan's Louisiana and Texas Railroad and Steamship Company, extending from New Orleans, Louisiana, to Lafayette, to Alexandria, to Baton Rouge, all in the State of Louisiana, with branch lines to various points in said State. Also the tugs El Listo, El Vivo, Juno and Restless, car transfer barges Mammoth and Mastodon, together with auxiliary floating equipment.

9. The railroad of the Louisiana Western Railroad Company, extending from Lafayette, Louisiana, to Mamou, to Abbeville, to Lake Arthur, and to the Sabine River, all in the State of Louisiana, with branch lines extending to various points in said State.

10. The railroad of the Lake Charles and Northern Railroad Company, extending from Lakes Charles, Louisiana, to De Ridder and Nitram in the same State.

11. The railroad of the Iberia and Vermilion Railroad Company, extending from Iberia and Vermilion Junction, Louisiana, to Salt Mine, and to Abbeville, in the same State, with branch lines to various points in said State.

together with all branches and tracks, trackage, bridge, and terminal rights, and lines of railroad owned by or leased to and operated by any of the Companies as a part of their systems of transportation, and all other property of the Companies, with the appurtenances thereof, whether included in the foregoing list or not, the revenues of which were used, or which, if the property had been then owned by or leased to any of the Companies and had then been revenue bearing, would have been used, in computing its standard return.

Each of the Companies reserves to itself the benefit of all leases (and of all rents and revenues accruing therefrom) of parts of its right of way, station grounds, and other property, the revenues from which under the accounting rules of the Commission in force during the test period were properly creditable to "miscellaneous rent income" or "miscellaneous income." Each of the Companies grants to the Director General all its rights to terminate leases of any part of its right of way, yards, or station grounds, and to occupy and use the premises of any such lessee when, in his judgment, the same is required for operating purposes. Each of the Companies shall have for its own benefit the right to lease for industrial sites or other purposes such portion of its right of way, yards, or station grounds, or structures thereon as are not required by the Director General for operating purposes, and to receive and enjoy the rentals therefrom, subject to the right of the Director General to cancel any such lease and to occupy the premises or structures whenever, in his judgment, the same are necessary for operating purposes. All expenses connected with any such property heretofore or hereafter leased or otherwise occupied as in this paragraph provided, including taxes thereon which during the test period were not charged to railway tax accruals, shall be paid by the Companies while receiving the revenues therefrom.

The Director General shall have the right during Federal control to use and occupy for his purposes so much of the Company's office building in San Francisco, California, located in the block bounded by Market, Stewart, Mission and Spear Streets, and of the two buildings of the Company in the same block (known as the Buckley Building or Annex A, and the Brandenstein Building or Annex B) as in his opinion is required. He shall pay to the Company for [fol. 26] the portion of the buildings so occupied a rental the amount of which shall be determined as follows: The annual rental value of the entire building shall be taken to be the sum of the following factors: Five per cent for interest on the cost of land and buildings as of December 31, 1917; two per cent for depreciation on the cost of the buildings as of said date; expenses of operation, including maintenance and insurance; and taxes. The total square feet of space in the buildings available for business purposes shall be ascertained. The rate per square foot shall be derived by dividing the annual rental value of the entire buildings by total square feet of space available for business purposes. The product of the rate per square foot by the square feet of space occupied as aforesaid by the Director General shall constitute the annual rental to be paid to the company (in addition to the compensation provided in section 7 hereof) which shall, out of its own funds, pay all expenses of operation, including maintenance and insurance, and taxes, and shall have the right to occupy for its corporate purposes or lease to others the portions of the buildings not occupied by the Director General. The annual rent so determined shall be payable monthly. This provision shall be retroactive to January 1, 1918, and the accounts of the parties shall be adjusted in conformity herewith; and

the amounts, if any, upon such adjustment found due to the Company for the use of said buildings from January 1, 1918, to the date of the execution of this agreement shall be due and payable on the execution hereof. Provided, however, that for the space in said buildings occupied by the Director General on December 1, 1918, estimated at two hundred and eight thousand, two hundred and nine (208,209) square feet, the total annual rent to be paid by him under the foregoing provisions shall not exceed the sum of one dollar and fourteen cents ($1.14) per square foot.

(b) All materials and supplies on hand at midnight December 31, 1917.

(c) All balances in the account or accounts representing the total of "Net balance receivable from agents and conductors" as of midnight December 31, 1917;

Section 3—Acceptance

Sec. 3. (a) The Companies accept all the terms and conditions of the Federal control act and any regulation or order made by or through the President under authority of said act or of that portion of the act approved August 29, 1916, referred to in paragraph (a) of the preamble to this agreement which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation; and they further and expressly accept the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights, at law or in equity, which they or any of them now have or hereafter can have, otherwise than under this agreement, against the United States, the President, the Director General, or any agent or agency thereof, for compensation under the Constitution and laws of the United States for the taking possession of their property, and for the use, control, and operation thereof during Federal control, and for any and all loss and damage to their business or traffic by reason of the diversion thereof or otherwise which has been or may be caused by said taking or by said possession, use, control, and operation.

No claim is made by the Companies for compensation for the period between noon of December 28 and midnight of December 31, 1917; and the revenues of said period shall belong to the Companies, and the expenses thereof shall be paid by them, allocated in both cases as provided in paragraph (b) of section 4 hereof.

(b) The Companies, on their own initiative or upon the request of the Director General, shall take all appropriate and necessary corporate action to carry out the obligations assumed by them in this agreement or lawfully imposed upon them by or pursuant to the proclamation of December 26, 1917, or by the Federal control act.

(c) The Federal control act being in section 16 thereof expressly declared to be emergency legislation enacted to meet conditions

growing out of war, nothing in this agreement shall be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of the Companies, or the method or basis of the capitalization thereof, and the recitals or provisions of this agreement shall not be used as evidence or otherwise, by or against any party hereto in any pending or future proceeding which involves the acquisition or valuation of the property of any of the Companies or any part thereof; but nothing in this paragraph shall be taken or construed as affecting the settlement and discharge contained in paragraph (a) of this section, nor as limiting or qualifying any of the provisions of said paragraph for the purposes thereof, nor as limiting the use of this agreement as evidence in any proceeding under this agreement or under the Federal control act.

[fol. 27] Section 4—Operation and Accounting During Federal Control

Sec. 4. (a) All amounts received by the Director General under paragraph (c) of section 2 hereof and all other amounts whether received from the Companies in cash or collected or realized upon by him from current operating assets belonging to the Companies or arising from railway operations prior to midnight of December 31, 1917, shall be credited by him to the Companies; and the Director General shall, to the extent of the cash so received or realized, pay and charge to the Companies all expenses arising out of railway operations prior to January 1, 1918, including reparation claims, and unless objected to by the Company, may pay and charge to the Companies any of such expenses, including reparation claims, in excess of the cash so received or realized. Balances of the above accounts shall be struck quarterly on the last days of March, June, September, and December of each year, and the cash balance found on such adjustments to be due either party shall be then payable and, if not paid, shall bear interest at the rate of 6 per cent per annum, unless the parties shall agree upon a different rate; except that the rate of interest on any portion of a balance found due to the Companies which is derived from cash in bank to the credit of the Companies on interest, shall be adjusted in each case independently of this contract as the parties may agree.

(b) Railway operating expenses, reparation and other claims, hire of equipment and joint facility rents shall be allocated with reference to the time when incurred as between the period prior and subsequent to midnight of December 31, 1917, and as between the period of Federal control and the period subsequent thereto. Railway operating revenues shall be allocated as between the period prior and subsequent to midnight of December 31, 1917, in accordance with the established accrual practices of the Companies; except that where prior to midnight of December 31, 1917, the Company's part of a service on through business had been completed or carload lots on their own lines had reached destination, the revenue of the Com-

panies for such service shall be allocated to them; but as to classes of traffic where in the opinion of the Director General such allocation will involve undue delay or undue absorption of accounting labor, such revenues shall be allocated in accordance with the established accrual practices of the Companies. Like methods of accruing and allocating such revenues shall be made at the end of Federal control.

(c) All expenditures made by the Director General during Federal control for additions and betterments, exclusive of equipment, or for extensions begun prior to January 1, 1918, shall be charged to the Companies, and if the completion of any such addition, betterment, or extension is approved or ordered by the Director General, the Companies shall be entitled under the provisions of paragraph (d) of section 7 hereof to interest on the cost thereof from the completion of the work; but no interest (except to the extent that the same may be allowed and included in the compensation provided for in paragraph (a) of section 7 hereof) shall be due the Company upon any such expenditures for work done prior to January 1, 1918. Payments for all equipment ordered or under construction by the Companies prior to January 1, 1918, but delivered on or after that date, shall also be considered as expenditures made by order or approval of the Director General under paragraph (d) of section 7 hereof. Interest during construction payable under this paragraph, and also interest during construction on the cost of any additions, betterments, and road extensions made by the Companies or at their expense to the Companies' property during Federal control, shall be included in the cost of the work.

(d) Cash receipts or disbursements and other items arising out of transactions which do not enter into or form a part of those used in determining the Companies' standard return shall not be received or paid by the Director General unless such transactions are negotiated or conducted by his order for account of the Companies and with the consent of the Company. When moneys are so received or paid by the Director General in connection with such corporate transactions they shall be credited or charged to the Companies. There shall be an accounting of the amounts due by or to any of the parties under this paragraph at the end of each quarter year of Federal control, and the amount so found due shall be then payable and if not paid shall bear interest as provided in paragraph (a) of this section.

(e) All sums paid by the Director General to maintain pension funds or pension obligations or practices, and all contributions to Young Men's Christian Associations or employees, employees' savings funds, relief funds or associations, reading rooms, or health, accident, or death benefits for employees, shall be treated as a part of railway operating expenses during Federal control.

The Company shall continue during Federal control in substantially the same way as it did during the test period to operate and maintain its general hospital at San Francisco, the Huntington Social Hall at San Francisco, the Crocker Memorial Hospital at Sacra-

mento, and the emergency hospitals located at various points along its lines of railroad described in paragraph (a) of section 2 hereof, and to make arrangements at other points on said lines, when necessary, for the care and treatment of the employees on said properties. The Company, through its Chief Surgeon, shall continue to render such surgical and medical services as were rendered prior to Federal control, including services incident to personal injuries, the physical examinations of employees, and supervision of sanitary conditions; but the beneficiaries of the hospital system and services shall be only the officers and employees of the Company and the officers and employees of the Director General on the properties of the Company described in paragraph (a) of section 2 hereof.

The Director General shall during Federal control provide for the continuance of the contributions of fifty cents per month to be made by all officers and employees, the same to be collected by deduction from the pay-rolls, as heretofore, and paid over as collected to the Company. He shall continue to charge to operating expenses and pay to the said Company the sum of six hundred and forty-five dollars each month in return for the services hereinabove provided for incident to personal injuries and the physical examination of employees. He shall also continue to charge to operating expenses the expenses actually incurred in the maintenance of the emergency hospitals located at various points along the lines of the Company of the class heretofore charged to operating expenses of the railroads; and shall continue to give free transportation as heertofore to the surgeons and physicians of the Company.

The Company shall continue to receive and expend as heretofore the interest on the Harriman Laboratory Fund now in the hands of the Union Trust Company of San Francisco. The Company accepts the contributions and monthly sum herein agreed to be paid to it in full compensation for the use of its hospital buildings and equipment and for the continued operation of the same as heretofore and for the rendition of the other surgical or medical services hereinabove described.

Until the Director General otherwise directs, the arrangement between The Galveston, Harrisburg and San Antonio Railway Company and the Hospital Association of the Sunset-Central Lines, composed of employees of the nine railroad companies of Texas and Louisiana, parties to this agreement, for the rent of said company's hospital building and its appurtenances at Houston, Texas, shall continue in force, the compensation or rental to said company to be the same as for the year ended December 31, 1917, namely, $16,552.80 per annum. Should the Director General terminate the operation of said hospital by the said Hospital Association, he shall have the right during Federal control to rent from said company the said hospital and its appurtenances at the annual compensation or rental as aforesaid of $16,552.80, payable monthly. The said company consents that the Hospital Association may extend its membership so as to include employees of other lines in the benefits of the hospital, such extension of membership, however, not to exceed the present capacity of the hospital.

[fol. 28] (f) All salaries and expenditures incurred by the Companies during Federal control for purposes which relate to the existence and maintenance of the corporations, or to the properties of the Companies not taken over by the President, or to negotiations, contracts, valuations, or any business controversy with the Government or any branch thereof, and which are not specially authorized by the Director General, shall be borne by the Companies; except that the expenses of valuation now being made by the Commission to the extent that they are, in the opinion of the Director General, necessary to comply with the valuation orders and other requirements of the Commission and to the cooperation of the Companies in the making of such valuation, shall be paid by the Director General as part of railway operating expenses. If the Company is dissatisfied with the ruling of the Director General it may appeal to the Commission, whose decision shall be final.

(g) The Director General shall furnish for additions, betterments and road extensions to the Companies' property approved or ordered by him any of the materials and supplies taken over under paragraph (b) of section 2 hereof, or purchased by him and held for use in connection with the Companies' property, in so far as, in his judgment, he can do so with due regard to his own requirements. Materials and supplies so furnished shall be charged to the Companies at cost.

(h) The Director General shall at his option be substituted for the period of Federal control in the place of the Companies in respect of the benefits and obligations of contracts relating to operation in force January 1, 1918 (including contracts made by subsidiaries for the use and benefit of the Companies and the right to abrogate or change and make new contracts with express companies for the period of Federal control), except as to contracts between the Companies and subsidiary companies which shall be considered and treated as arrangements or practices; and the Director General shall in like manner at his option be substituted for such period in respect of the benefits and obligations of arrangements and practices in force during the test period in regard to fuel, materials, and supplies for the operation of the property described in paragraph (a) of section 2 hereof and of any additions, betterments, and road extensions thereto, obtained from any mine, oil field, or other source of supply owned or controlled by the Companies, it being understood that under such arrangements or practices, if availed of by the Director General, he shall, to the extent necessary to offset any increase in the standard return growing out of the furnishing by the Companies or their subsidiaries, during the test period of fuel, materials, and supplies under an arrangement or practice at less than the then cost or the then market value thereof for railroad purposes, be charged for such fuel, materials, and supplies a price expressed in dollars or cents per unit below or above the then cost or the then market value thereof for railroad purposes (as the practice of the Companies may have been) in the same amount that the prices charged the Companies during the test period were below or above the then cost or the then market value thereof for railroad

purposes; and at the request of the Director General or the Companies the prices for fuel or materials supplied between December 31, 1917, and the execution of this contract shall be adjusted on the foregoing basis: Provided, however, That a source of supply which the Companies had acquired to safeguard their own operations shall not be depleted or reduced for use on other transportation systems, except in cases of emergency to be determined by the Director General, in which event the quantity so used on other transportation systems shall be accounted for to the Companies at the fair value thereof: And provided further, That materials and supplies secured under contracts which the Companies had made for their own operations shall, so far as practicable, be used on the Companies' property, and that, if used on any other transportation system, materials and supplies of like character shall be furnished by the Director General for use in making such additions, betterments, and road extensions as shall be chargeable to the Companies, and shall be charged at cost under such contracts.

(i) The Director General shall pay, or save the Companies harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during Federal con-
[fol. 29] trol, except the expenses which under this agreement are to be borne by the Companies. He shall also pay or save the Companies harmless from all rents called in the monthly reports to the Commission equipment rents or joint-facility rents, and all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon, the Companies by reason of any cause of action arising out of Federal control, or of anything done or omitted in the possession, operation, use, or control of the Companies' property during Federal control, except judgments or decrees founded on obligations of the Companies to the Director General or the United States.

(j) Except as otherwise provided in this agreement, the Director General shall save the Companies harmless from any and all liability, loss, or expense resulting from or incident to any claim made against the Companies growing out of anything done or omitted during Federal control in connection with, or incident to, operation or existing contracts relating to operation, and shall do and perform, so far as is requisite under Federal control for the protection of the Companies, all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or of anything done or omitted thereunder, the forfeiture or loss by the Companies of any of their property rights, ordinance rights or franchises, or of their trackage, lease, terminal, or other contracts involving a facility of operation; but nothing herein contained shall be construed to require the Director General to make any capital expenditure necessary to preserve a franchise or ordinance right not heretofore availed of by the Companies. The Director General shall also save the Companies harmless from any and all claims for breach of covenant heretofore entered by the Companies or by any predecessor in title or interest in any mortgage or other instrument in respect to insurance against losses by fire.

Nothing in this or in the preceding paragraph shall be construed to be an assumption by the Director General of, or to make him liable on, any obligation of the Companies to pay a debt secured by a mortgage or any rent under a lease, except rents which during the test period were called in the monthly reports to the Commission equipment rents and joint facility rents and rents which under the accounting rules of the Commission in force during the test period were classified as operating expenses; or to make the Director General liable to the Companies in respect of any interest on any bonds issued by, or in respect of any obligations of, other corporations, or in respect of contributions to make up deficits in the earnings of other corporations, except as payments in respect of such interest or other amounts were classified under said rules as equipment or joint facility rents, or were a class of payments to be otherwise reflected in railway operating income.

The Companies shall, during Federal control, pay the rents of any property, held by them under lease or contract, described in paragraph (a) of section 2 hereof, except the rents which during the test period, were under the rules of the Commission, classified as equipment rents or joint facility rents, and rents which were classified as operating expenses; which excepted rents shall be paid by the Director General. If the lease of, or right to use, any property described in paragraph (a) of said section 2 expires during Federal control. the Companies shall, if possible, and if requested by the Director General, renew the same; the rental, however, of property in the excepted classes above mentioned shall be paid by the Director General. The Companies shall pay the same amount of rent as was payable at the beginning of Federal control for other property, the lease of or right to use which is renewed at the request of the Director General. but any increases in the rental of such other property shall be paid by the Director General.

(k) In carrying out the provisions of paragraphs (a), (b), (c), and (d) of this section and the provisions of section 6 hereof the Director General shall not settle any claim by or against the Companies against the objection in writing of the president or of any other duly authorized officer of the Companies. The conduct of all litigation before any court or commission arising out of such disputed claims, or out of operation prior to Federal control, shall be in charge of the Director General's legal force and the expense [fol. 30] thereof shall be paid by the Director General; but the Companies may, at their own expense, employ special counsel in connection with any such litigation.

(l) Nothing in this agreement shall be construed as inconsistent with the provision in section 10 of the Federal control act that no process, mesne or final, shall be levied against any property under Federal control, nor as a waiver by the United States of any claim that might otherwise be made by it that the rights of any State or subdivision thereof or of any individual or corporation have been abrogated or suspended by the taking over of the Companies' property or by Federal control.

(m) The Companies shall have the right at all reasonable times to inspect the books and accounts kept by the Director General relating to their property or to the operation thereof, and the Director General shall during Federal control furnish the Companies with copies of the operating reports relating to their property, and as soon as practicable after the end of each fiscal year shall furnish to the Companies a complete list of their equipment as of the end of such fiscal year.

[fol. 31] Section 5—Upkeep

Sec. 5. (a) During the period of Federal control the Director General shall, annually, as nearly as practicable, expend and charge to railway operating expenses, either in payments for labor and material or by payments into funds, such sums for the maintenance, repair, renewal, retirement, and depreciation of the property described in paragraph (a) of section 2 hereof as may be requisite in order that such property may be returned to the Companies at the end of Federal control in substantially as good repair and in substantially as complete equipment as it was on January 1, 1918: Provided, however, That the annual expenditure and charges for such purposes during the period of Federal control on such property and the fair distribution thereof over the same, or the payment into funds of an amount equal in the aggregate (subject to the adjustments provided in paragraph (c) and to the provisions of paragraph (e) of this section) to the average annual expenditure and charges for such purposes included under the accounting rules of the Commission in railway operating expenses during the test period, less the cost of fire and marine insurance included therein, shall be taken as a full compliance with the foregoing covenant.

(b) The Director General may expend such sums, if any, in addition to those expended and charged under paragraph (a) of this section (subject to the adjustments provided in paragraph (c) of this section) as may be requisite for the safe operation of the property described in paragraph (a) of section 2 hereof, assuming a use similar to the use during the test period and not substantially enhancing the cost of maintenance over the normal standard of maintenance of railroads of like character and business during said period; and the amount, if any, of such excess expenditures during Federal control shall be made good by the Companies as provided in paragraph (b) of section 7 hereof.

(c) In comparing the amounts expended and charged under the provisions of paragraphs (a) and (b) of this section with the amounts expended and charged during the test period, due allowance shall be made for any difference that may exist between the cost of labor and materials and between the amount of property taken over and the average for the test period, and, as to paragraph (a), for any difference in use between that of the test period and during Federal control which in the opinion of the Commission is substantial enough to be considered, so that the result shall be, as nearly as practicable,

the same relative amount, character, and durability of physical reparation.

(d) At the request of the Director General or the Company there shall be an accounting of the amounts due by or to any of the parties under paragraphs (a) and (b) of this section at the end of each year of Federal control and at the end of Federal control.

(e) If during Federal control any of the property, other than floating equipment, described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged otherwise than by fire or public enemies, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss; and the cost of restoration or replacement, or said value or damage, as the case may be, shall be charged to annual railway operating expenses; it being understood that extraordinary losses caused by floods, explosions, train wrecks or accident are included in the matters covered by this paragraph, while ordinary losses due to such causes are included in the matters covered by paragraph (a) of this section: Provided, however, That if the Commission on application of the Director General or the Company and after giving due consideration to the practice of the Companies during the test period in respect to such matters and to any other pertinent facts and circumstances, determines that it is just and reasonable that the said cost or value shall be apportioned or extended over a period of more than one year, this shall be done, and so much of said cost or value as may be apportioned by the Commission over the period subsequent to Federal control, shall be charged to the Companies in the final accounting at the end of Federal control and shall be paid by them.

[fol. 32] If, during Federal control, any of the property described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged by fire or marine casualty, or any of the floating equipment described in paragraph (a) of section 2 hereof is destroyed or damaged by war risks while in ocean waters outside of the three-mile limit, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss; and the cost of restoration or replacement or said *said* value or damage, as the case may be, shall be charged to annual railway operating expenses, but the same shall not be considered a charge to such expenses for the purposes specified in paragraph (a) of this section.

In case of any such loss or damage by fire, or marine casualty, the Director General shall, if given written notice of the requirements of any mortgages, equipment lease, or trust on the property so destroyed or damaged, make such restoration or replacement, or pay such value or damage, in such way as to meet the requirements of such mortgage, equipment lease, or trust in the same manner as would have been proper in applying the proceeds of insurance on

such property if it had been insured by the Companies against loss or damage in accordance with the terms of such instruments of lien; and a compliance with the written request of the Company in respect thereof shall be a full acquittance of any obligation of the Director General in the premises.

The words "marine casualty" are used herein as applying to floating equipment and as meaning casualties covered by the usual marine insurance policy, including collision clause, and losses or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosion, bursting of boilers or breakage of shafts or through carrying explosives.

The foregoing parts of this paragraph are subject to the proviso that in case of loss or damage any additions and betterments made in connection with or as a part of the restoration or replacement of property damaged or destroyed and chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, shall be charged to and paid by the Companies.

The Director General shall not be liable to the Companies for any loss or damage due to the acts of public enemies, except as provided in this paragraph (e) as to floating equipment.

(f) If any additions, betterments, or road extensions are made to the property taken over or any equipment is added at the expense of the Companies and with the approval or by order of the Director General during Federal control, he shall expend and charge to railway operating expenses such sums either in payments for labor and materials or by payments into funds, as may be requisite for the proper maintenance, repair, renewal, retirement, and depreciation of such property until the end of Federal control.

(g) The Companies shall have the right to inspect their property at all reasonable times during Federal control, and the Director General shall provide reasonable facilities for such inspection.

(h) If any question shall arise, either during or at the end of Federal control, as to whether the covenants or provisions in this section contained are being or have been observed, the matter in dispute shall, on the application of the Director General or the Company, be referred to the Commission which, after hearing, shall make such findings and order as justice and right may require, which shall be final as to the questions submitted and shall be binding on and observed by the parties hereto, except that the Director General or the Company may take any question of law to the courts, if he or it so desires.

Some of the steamships enumerated in paragraph (a) of Section 2 hereof, having been on January 1, 1918, under charter to different departments of the United States Government the Company hereby subrogates the Director General to all its rights and obligations under any and all such charter-parties, all charter hire, however, accruing under any of the same for the period prior to January 1, 1918, to be paid to the Company; and the Director General shall

enforce the rights of the Company including the right, if any, to have such steamships returned by the charterer in as good order and condition as when received.

[fol. 33] Section 6—Taxes

Sec. 6. (a) All taxes assessed under Federal or any other governmental authority for the period prior to January 1, 1918, including a proportionate part of any such tax assessed after December 31, 1917, for a period which includes any part of 1917 or preceding years and unpaid on that date, all taxes commonly called war taxes which have been or may be assessed against the Companies under the act of Congress entitled "An act to provide revenue to defray war expenses, and for other purposes," approved October 3, 1917, or under any act in addition thereto or in amendment thereof, and all taxes which have been or may be assessed on property under construction, and all assessments which have been or may be made for public improvements, chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, shall be paid by the Companies; but upon the amount thus chargeable to investment interest shall be paid to the Company during Federal control at the rate provided in paragraph (d) of section 7 hereof. Taxes assessed during construction on additions, betterments, and road extensions made by the Companies with the approval or by order of the Director General during Federal control shall be considered a part of the cost of such additions, betterments, and extensions, and shall, under the provisions of paragraph (d) of section 7 hereof, bear interest as a part of such cost from the date of the completion of such additions, betterments, or extensions. Assessments for public improvements which do not become a part of the property taken over shall bear interest from the date of the payment of such assessment.

(b) If any tax or assessment which under this agreement is to be paid by the Companies is not paid by them when due, the same may be paid by the Director General and deducted from the next installment of compensation due under section 7 hereof. If any taxes properly chargeable to the Director General have been or shall be paid by the Companies, they shall be duly reimbused therefor.

(c) The Director General shall either pay out of revenues derived from railway operation during the period of Federal control or shall save the Companies harmless from all taxes lawfully assessed under Federal or any other governmental authority for any part of said period on the property under such control, or on the right to operate as a carrier, or on the revenues derived from operation, and all other taxes which under the accounting rules of the Commission in force December 31, 1917, are properly chargeable to "railway tax accruals," except the taxes and assessments for which provision is made in paragraph (a) of this section. The Director General shall pay or save the companies harmless from the expense of all

suits respecting the classes of taxes payable by him under this agreement.

(d) If any such tax is for a period which began before January 1, 1918, or continues beyond the period of Federal control, such portion of such tax as may be apportionable to the period of Federal control shall be paid by the Director General, and the remainder shall be paid by the Companies.

(e) Whenever a period for which a tax is assessed cannot be definitely determined, so much of such tax as is payable in any calendar year shall be treated as assessed for such year.

[fol. 34] Section 7—Compensation

Sec. 7. (a) The annual compensation guaranteed to the Companies under section 1 of the Federal control act shall be the net aggregate of the Companies' standard return and of the special compensation set forth in paragraph (e), (f) and (g) of the preamble of this agreement, namely, the sum of forty-seven million nine hundred and fifty-nine thousand eight hundred and ninety-eight dollars and eight cents ($47,959,898.08) during each year and pro rata for each fractional part of a year of Federal control, subject, however, to any increase or decrease in the standard return hereafter made by the Commission as provided in paragraph (e) of the preamble of this agreement.

Compensation paid by the Director General under this agreement, including that provided for in paragraph (d) of this section, or arising from any other source, shall be paid to the Company; and the Company, after retaining such part thereof as it may be entitled to retain shall distribute the remainder to the parties entitled thereto.

(b) The said compensation shall be paid to the Company quarterly in equal installments on the last days of March, June, September, and December of each year for the quarter ending therewith, except that the first four installments shall be due as of March 31, 1918, June 30, 1918, September 30, 1918, and December 31, 1918, respectively, but shall be paid upon the execution of this agreement; but from each installment there may be deducted any amount then due by the Companies under paragraphs (a) and (d) of section 4 hereof, under paragraph (b) of section 5 hereof, and under paragraph (b) of section 6 hereof, and all amounts required to reimburse the United States for the cost of additions and betterments made to the property of the Companies not justly chargeable to the United States, unless such matters are financed or otherwise taken care of by the Companies to the satisfaction of the Director General, and the Director General may apportion any such amounts to two or more subsequent installments: Provided, however, That said power to deduct amounts due or accruing under paragraph (b) of section 5 hereof and the cost of additions and betterments not justly chargeable to the United States shall not be so exercised as to prevent the Companies from paying out the sums reasonably required to support their corporate organizations, to keep up sinking funds for

the Companies' debts required by contracts in force December 31, 1917, to pay their taxes, to pay rents and other amounts (not chargeable to capital account) properly payable by the Companies for leased or operated roads and properties, to pay interest which has heretofore been regularly paid by the Companies, and interest on loans issued during Federal control and approved by the Director General, nor shall such deduction be made in respect of additions and betterments which are for war purposes and not for the normal development of the Companies, nor in respect of road extensions, nor in respect of amounts due under paragraphs (a) and (d) of section 4 hereof, in cases where the current assets, including materials and supplies, of the Companies taken over by the Director General under the provisions of this agreement clearly exceed the current liabilities of the Companies paid or assumed by the Director General under said section. In the event of a difference as to the fact whether additions and betterments are for war purposes and not for the normal development of the Companies, or as to whether an addition is a road extension, the question may, on application of the Director General or the Company, be referred to and determined by the Commission.

The power provided in this paragraph to deduct the amount due by the Companies for the cost of additions and betterments not justly chargeable to the United States is further declared to be an emergency power, to be used by the Director General only when he finds that no other reasonable means is provided by the Companies to reimburse the United States, and, as contemplated by the President's proclamation and by the Federal control act, it will be the policy of the Director General to so use such power of deduction as not to interrupt unnecessarily the regular payment of dividends as made by the Companies during the test period.

[fol. 35] Overdue installments of compensation, or balances thereof, provided for in this section shall bear interest from maturity at the rate of five per cent per annum, except that if the Director General shall, prior to the execution of this contract, have loaned the Companies any money, then, to the extent of the amount thus loaned, the installments of compensation overdue at the date of the execution hereof shall bear interest from maturity at the same rate as that charged to the Companies on such loans.

(c) During Federal control the Companies shall not, without the prior approval of the Director General, issue any bonds, notes, equipment trust certificates, stock, or other securities, or enter into any contracts (except contracts in respect of corporate affairs and property not taken under Federal control), or agree to pay interest on their debts at a higher rate, or for rent of leased roads and properties a larger amount, than the rates and amounts payable as of, or required by contracts in force on, December 31, 1917. The Companies may, however, procure the authentication and delivery to them under any mortgage or trust deed or agreement in force December 31, 1917, of bonds or notes issuable thereunder in respect of additions, betterments, extensions, and equipment, or for refunding purposes.

(d) Upon the cost of additions and betterments, less retirements in connection therewith, and upon the cost of road extensions, made to the property of the Companies during Federal control, the Director General shall, from the completion of the work, pay the Company a reasonable rate of interest, to be fixed by him on each occasion. In fixing such rate or rates he may take into account not merely the value of money but all pertinent facts and circumstances, whether the money used was derived from loans or otherwise, provided that to the extent that the money is advanced by the Director General or is obtained by the Companies from loans or from the proceeds of securities the rate or rates shall be the same as that charged by the Director General for loans to the Companies or to other companies of similar credit.

(e) From the compensation so received or from other income, if adequate for the purpose, the Companies shall make all payments of interest, rents (other than the equipment rents, joint facility rents, and rents classified as operating expenses mentioned in paragraph (j) of section 4 hereof), and other sums necessary to prevent a default under any mortgage or lease of any of the property described in paragraph (a) of section 2 hereof; and if at any time during Federal control the Companies, by virtue of any change in the right of possession (subject to the rights of the United States) to any of said property or otherwise, shall no longer be entitled as between themselves and any other person or corporation, not a party to this agreement, to receive the entire compensation herein provided, such compensation shall be apportioned and paid as between those entitled thereto, as justice and right may require.

[fol. 36] Section 8—Claims for Losses on Additions, etc.

Sec. 8. (a) Prompt notice in writing, except as provided in paragraph (d) of this section, shall be given the Companies of the making or ordering of any additions, betterments, or road extensions, including terminals, motive power, cars, or other equipment to or for the property of the Companies costing more than one thousand dollars, with an estimate of the cost thereof. Such notice shall be given before the beginning of the work or the acquisition of the property whenever in the judgment of the Director General it is practicable to do so. Within a reasonable time after the completion of the work or the acquisition of the property, a written statement of the final cost thereof shall be given the Companies. There shall be furnished the Companies, as soon as practicable after the end of each month, a written statement of all expenditures estimated to cost one thousand dollars or less chargeable to investment in road and equipment made during the month, with a brief description of the work done or of the property acquired; and such statement shall constitute all the notice of additions and betterments costing one thousand dollars or less required by (b) and (c) of this section. The notices provided in this paragraph may be given to the president of the Company unless the Company designates some other officer to receive

the same, in which event the notice shall be given to such other officer.

(b) Any claim of the Companies for loss accruing to them by reason of expenditures for additions and betterments made to their property during Federal control in connection with or as a part of the work of maintaining, repairing, and renewing the Companies' property and chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, except such expenditures as are incurred in connection with the replacement of buildings and structures in new locations, may be determined by agreement between the Director General and the Companies, or, failing such agreement as to the fact or amount of such loss, the questions at issue may, upon the application of the Director General or the Companies at any time after the filing of the statement of claim hereinafter referred to, be ascertained in the manner provided in section 3 of the Federal control act: Provided, however, that no loss shall be claimed by the Companies and no money shall be due them in respect of such additions and betterments upon the ground that the actual cost thereof at the time of construction was greater than under other market and commercial conditions; and for the purpose of determining such controversy the amount paid for any addition or betterment shall be deemed the fair and reasonable cost thereof and shall be taken as the basis for such determination; nor unless the Companies, within sixty days of notice to them that the work will be done, shall give the Director General notice of objection thereto and shall file with the Director General a statement of claim within ninety days after notice of the completion of the work.

(c) Any claim of the Companies for loss accruing to them by reason of any additions and betterments which are not made in connection with or as a part of the work of maintaining, repairing, and renewing the Companies' property, or accruing to them in connection with maintenance in the replacement of buildings and structures in new locations, or by reason of road extensions, terminals, motive power, cars, or other equipment made to or provided for the property of the Companies during Federal control, may be determined by agreement between the Director General and the Companies, or failing such agreement as to the fact or amount of such loss, may, by proceedings instituted not later than six months after the end of Federal control, be ascertained in the manner provided in section 3 of the Federal control act: Provided, however, that no loss shall be claimed by the Companies and no money shall be due to them in respect of such additions, betterments, road extensions, terminals, motive power, cars, or other equipment mentioned in this paragraph upon the ground that the actual cost thereof at the time of construction or acquisition was greater than under other market and commercial conditions; and for the purpose of determining such con- [fol. 37] troversy the amount paid for any additions, betterments, road extensions, terminals, motive power, cars, or other equipment

shall be deemed the fair and reasonable cost thereof and shall be taken as the basis of such determination; nor unless within sixty days after notice to the Company of such construction or acquisition written notice is given to the Director General by the Company that a loss will be claimed in respect thereof. With and as a part of such notice the Company shall state the objections to such construction or acquisition as far as reasonably practicable at the time. Nothing in this agreement shall be construed as barring the United States from contending that no loss within the meaning of the Federal control act accrued to the Companies by reason of any additions, betterments, or road extensions made during Federal control by order or approval of the Director General, if it is made to appear that the Companies themselves but for Federal control should in the exercise of sound judgment have made such addition, betterment, or road extension.

(d) Where additions, betterments, or road extensions or terminals, motive power, cars, or other equipment have been made to or provided for the property of the Companies during Federal control but prior to the execution of this agreement, the Director General shall not be required to give the notice thereof provided for in paragraph (a) of this section, and notice by the Company of any claim of loss in respect thereto may be given the Director General within ninety days after the execution hereof; and such claims shall thereafter be proceeded with in the manner provided in paragraph (b) or paragraph (c) of this section, as the case may be.

(e) The Director General shall reimburse the Companies for the amount of loss ascertained under this section with a proper adjustment of interest thereon.

(f) The Director General shall not acquire any motive power, cars, or other equipment at the expense, or on the credit, of the Companies in excess of what in his judgment is necessary, in addition to their then existing equipment, to provide for the traffic requirements of their own systems of transportation; but this provision shall not prevent the Director General, after the acquisition of such equipment, from using the same, or any part thereof, on the line of any other transportation system operated by him.

[fol. 38] Section 9—Final Accounting

Sec. 9 (a) At the end of Federal control all the property described in paragraph (a) of section 2 hereof shall be returned to the Companies, together with all repairs, renewals, additions, betterments, replacements, and road extensions thereto which have been made during Federal control, except as any part thereof may have been destroyed or retired and not replaced, in which case the provisions of section 5 hereof shall govern and except that the Director General shall not be obliged, otherwise than as provided in paragraph (i) of said section 5, to restore or replace property destroyed or damaged by the acts of public enemies.

(b) At the end of Federal control the Director General shall return to the Companies all uncollected accounts received by him from them and also materials and supplies equal in quantity, quality, and relative usefulness to that of the materials and supplies which he received, and to the extent that the Director General does not return such materials and supplies he shall account for the same at prices prevailing at the end of Federal control. To the extent that the Companies receive materials and supplies in excess of those delivered by them to the Director General they shall account for the same at the prices prevailing at the end of Federal control and the balance shall be adjusted in cash.

(c) The total amount of the account "Net balance receivable from agents and conductors" at the end of Federal control may be turned over by the Director General to the Company. He may also turn over all assets which have accrued out of operation; and the Company shall, to the extent of the cash received or realized from such assets, pay and charge to the Director General all expenses arising out of railway operations during Federal control, including reparation and other claims, and may, unless objection is made by the Director General, pay and charge to him any such expenses, including reparation and other claims, in excess of the cash so received or realized. On the first day of the third month following the termination of Federal control an accounting between the parties shall be had, and so on the first of each third month thereafter. Any balance found due either party shall be payable as of the date on which the account is stated and shall bear interest until paid.

(d) At the end of Federal control there shall be paid to the Companies any balance then remaining unpaid of the cash received from them at the beginning of or during Federal control, together with any unpaid interest which may have accrued upon the same. There shall also be paid to the Companies any funds created under the provisions of this agreement except to the extent that such funds may have been properly used under this agreement.

(e) Wherever under any provision of this section there is to be an adjustment of interest, it shall be at the rate of five per cent per annum, unless the parties shall in any case agree on a different rate.

(f) After Federal control no claim by or against the Director General shall be settled by the Companies against the written objection of the Director General or the Attorney General of the United States. The conduct of all litigation before any court or commission arising out of such disputed claims or out of operations during Federal control shall be in charge of the Companies' legal force and the expense thereof shall be paid by the Companies; but the Director General or the Attorney General may, at the expense of the United States, employ special counsel in connection with any such litigation.

[fol. 39] Section 10—Agreement Not to Affect Rights Involved in Certain Litigation

Section 10. (a) The execution of this agreement, the provisions thereof and any action pursuant thereto shall not prejudice or affect the rights of any party to the suit of the United States against the Southern Pacific Company and others now pending in the Supreme Court of the United States on appeal from the District Court of the United States for the District of Utah, in which the United States seeks among other things the dissolution of the control of the Southern Pacific Company over the Central Pacific Railroad and its branches by leases or otherwise, and over the capital stock of the Central Pacific Railway Company.

(b) The United States does not hereby confirm or recognize the validity of such control or leases, or ownership of stock.

(c) In the event of any decree of dissolution or division of interests, in that suit, all obligations under this agreement shall be correspondingly divided and allocated to the several parts in dissolution.

(d) The Director General and the Southern Pacific Company shall be deemed sufficiently represented by the present parties to this suit to be bound as privies (for the purposes of this agreement) by any decrees in that suit.

[fol. 40] Execution.

In witness whereof, these presents have, on the day and year first above written, been duly signed, sealed and delivered by Walker D. Hines, Director General of Railroads, and by the Southern Pacific Company and by each of the Affiliated Companies, parties hereto of the second part, by their respective Presidents, or Chairmen of their respective Executive Committees, with their respective corporate seals hereto affixed, attested by their respective Secretaries or Assistant Secretaries; such execution and delivery on the part of said Companies having been duly authorized by their respective Boards of Directors at meetings duly called and held on various dates, said Boards of Directors having been thereto duly authorized, in the case of the Southern Pacific Company, at a meeting of the stockholders thereof duly called and held on the ninth day of October, 1918, at the principal office of the Company at Anchorage, Kentucky, and, as to the Affiliated Companies, by meetings of the stockholders thereof duly called and held at the principal offices of said Affiliated Companies, respectively, at various dates, as will appear by certificates of such meetings of said Boards and of said stockholders, duly attested by the respective Secretaries or Assistant

Secretaries of said Companies, lodged with the Director General of Railroads.

Walker D. Hines, Director General of Railroads. Southern Pacific Company, by J. Kruttschnitt, President. Attest: Hugh Neill, Secretary. (Seal.) Arizona Eastern Railroad Company, by J. Kruttschnitt, Chairman of the Executive Committee. Attest: Hugh Neill, Assistant Secretary. (Seal.) Houston & Texas Central Railroad Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) The Galveston, Harrisburg and San
[fol. 41] Antonio Railway Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) Texas and New Orleans Railroad Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) The Houston East and West Texas Railway Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) Houston and Shreveport Railroad Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) Morgan's Louisiana
[fol. 42] and Texas Railroad and Steamship Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) Louisiana Western Railroad Company, by C. K. Dunlap, President. Attest: Hugh Neill, Secretary. (Seal.) Lake Charles and Northern Railroad Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) Iberia and Vermilion Railroad Company, by C. K. Dunlay, President. Attest: A. K. Van Deventer, Assistant Secretary. (Seal.)

[fol. 43] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 607

STANDARD OIL COMPANY (NEW JERSEY), Petitioner,

against

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads, Respondents

EXHIBIT 2 TO TESTIMONY OF J. KRUTTSCHNITT

At the execution of a Commission for the examination of witnesses, wherein Standard Oil Company (New Jersey) is petitioner and Southern Pacific Company and James C. Davis, Director General of Railroads are respondents, this paper writing was produced and shown to Julius Kruttschnitt and by him deposed unto at the time of his examination and marked Exhibit 2 before

Wm. Parkin, Commissioner.

Copy

Southern Pacific Company, Executive Offices, 165 Broadway

Lewis J. Spence, Director of Traffic

New York, December 17, 1919.

Mr. E. R. Richardson, Federal Manager Coastwise Steamship Lines, Pier 49, North River, New York, N. Y.

Dear Sir: As you are aware, the steamship "Proteus" was sunk in collision with a Standard Oil tank steamer off Cape Hatteras on August 19, 1918. Under the contract between the Director General of Railroads and the Southern Pacific Company the former is responsible to the Company for the value of the property destroyed at the time of the loss, in the event the vessel is not restored or replaced by the Director General. I suggest it would be well for representatives of the Director General and of the Company to endeavor now to fix the amount of the liability in the premises of the Director General. I should like to have your views on the subject, and am ready on behalf of the Company to take the matter up with you at any time with a view to arriving at an amicable agreement.

Yours truly,

L. J. Spence.

[fol. 44] Supreme Court of the United States, October Term, 1923

No. 607

Standard Oil Company (New Jersey), Petitioner,

against

Southern Pacific Company and James C. Davis, Director General of Railroads, Respondents

Exhibit 3 to Testimony of J. Kruttschnitt

At the execution of a Commission for the examination of witnesses, wherein Standard Oil Company (New Jersey) is petitioner and Southern Pacific Company and James C. Davis, Director General of Railroads are respondents, this paper writing was produced and shown to Julius Kruttschnitt and by him deposed unto at the time of his examination and marked Exhibit 3 before

Wm. Parkin, Commissioner.

Copy

United States Railroad Administration, Director General of Railroads

E. R. Richardson, Federal Manager

Coastwise Steamship Lines, Pier 49, North River

New York, N. Y., February 18, 1920.

Mr. L. J. Spence, Director of Traffic Southern Pacific Company, 165 Broadway, New York.

DEAR SIR: I regret delay in replying to your letter of December 17th, regarding the SS. "Proteus," which was sunk in collision with a Standard Oil tank steamer off Cape Hatteras on August 19, 1918. You then expressed the desire that representatives of the Director-General and the Company endeavor to fix the amount of liability of the Director-General.

Since receipt of your letter we have been continuously pressing Mr. E. Marvin Underwood, General Counsel of the U. S. Railroad Administration for some advices along the lines of your suggestion, and we are just in receipt of a telegram from him dated February 17th, reading as follows:

"Your wire tenth, reference valuation steamship Proteus. Do not think practicable to arrive at valuation of steamer before termination Federal control. Period. Matter being considered here and arrangements for valuation will be made at early date."

Yours truly,

(Signed) E. R. Richardson.

[fol. 45] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 607

STANDARD OIL COMPANY (NEW JERSEY), Petitioner,

against

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads, Respondents

EXHIBIT 4 TO TESTIMONY OF J. KRUTTSCHNITT

At the execution of a Commission for the examination of witnesses, wherein Standard Oil Company (New Jersey) is petitioner and Southern Pacific Company and James C. Davis, Director General of Railroads are respondents, this paper writing was produced and shown to Julius Kruttschnitt and by him deposed unto at the time of his examination and marked Exhibit 4 before

Wm. Parkin, Commissioner.

Final Settlement Between the Director General of Railroads and the Southern Pacific Company and Other Corporations, December 19th, 1922

[fol. 46] Final Settlement

This agreement, entered into this 19th day of December, A. D. 1922, by and between James C. Davis, Director General of Railroads and Agent of the President, acting on behalf of the United States and the President, hereinafter called the "Director General," and the Southern Pacific Company, Arizona Eastern Railroad Company, Houston & Texas Central Railroad Company, The Galveston, Harrisburg and San Antonio Railway Company, Texas and New Orleans Railroad Company, The Houston East and West Texas Railway Company, Houston and Shreveport Railroad Company, Morgan's Louisiana and Texas Railroad and Steamship Company, Louisiana Western Railroad Company, Lake Charles and Northern Railroad Company, and Iberia and Vermilion Railroad Company, hereinafter called the "Companies,"

Witnesseth:

The said Companies, both jointly and severally, hereby acknowledge payment of the sum of Nine Million Two Hundred Fifty Thousand Dollars ($9,250,000.00) by the said Director General, the receipt whereof is hereby acknowledged, in full satisfaction and discharge of all claims, rights, and demands, of every kind and character, which the said Companies, or any of them, now have or hereafter may have or claim against the Director General, or any one representing or claiming to represent the Director General, the United States, or the President, growing out of or connected with the possession, use, and operation of the Companies' property by the United States during the period of Federal control, or out of the contract between the parties dated the 19th day of February, 1919; and the said Companies, both jointly and severally, hereby acknowledge the return to and receipt by them of all their property and rights which they are entitled to, and further acknowledge that the Director General has fully and completely complied with and satified all obligations on his part, or on the part of the United States, or the United States Railroad Administration, growing out of Federal control.

The purpose and effect of this instrument is to evidence a complete and final settlement of all demands, of every kind and character, as between the parties hereto, growing out of the Federal control of railroads, save and except that the following matters are not included in this adjustment and are not affected thereby:

Exceptions

1. The obligation on the part of the Companies, as expressed in the standard form of contract between the Director General and the Companies, as to the conduct of litigation arising out of Federal control (except as to claims and suits of carriers against the Director

General or the United States), as same is stated in paragraph (f) of Section 9 of said contract, is to continue and is not affected by this settlement.

2. This settlement does not include or affect any moneys or assets of the Director General turned over to the Companies pursuant to General Order No. 68, the account created by this order to be adjusted as though this agreement had not been made.

3. This settlement does not include the obligations of the Director General assumed in paragraphs (i) and (j) of Section 4 of said con- [fol. 47] tract, to save the Companies harmless as to claims, if any, of third persons, or the obligations of the Director General in respect to the payment of taxes under Section 6 of the contract; provided further that this settlement does not include claims, suits, and judgments based on causes of action arising between twelve o'clock, noon, December 28th, 1917, and twelve o'clock, midnight, of December 31st, 1917, during which period the carriers assume all liability.

4. This settlement does not affect or alter any obligation executed by the Companies, or any of them, for amounts loaned, advanced or funded by the Director General, or amounts due by reason of any equipment trust agreements, all such obligations on the part of the Companies, or any of them, to remain in full force, the same as if this agreement had not been entered into.

In witness whereof, the parties to this agreement have duly signed, sealed, and executed, same in quadruplicate, such agreement being duly executed by the Chairman of the Executive Committee or Controller of each of said Companies, and attested by the Secretary or Assistant Secretary, with the corporate seal hereto annexed, the execution by the officers of the respective Companies having been duly authorized by a vote of the Executive Committee or the Board of Directors of each of said Companies.

James C. Davis, Director General of Railroads and Agent of the President. Southern Pacific Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Secretary. (Seal.) Arizona Eastern Railroad Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) Houston & Texas Central Railroad Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) The Galveston, Harrisburg and San Antonio Raailway Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest. (Signed) Hugh Neill, Assistant [fol. 48] Secretary. (Seal.) Texas and New Orleans Railroad Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) The Houston East and West Texas Railway Company, by (Signed) J. Krutt-

schnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) Houston and Shreveport Railroad Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) Morgan's Louisiana and Texas Railroad and Steamship Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) Louisiana Western Railroad Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Secretary. (Seal.) Lake Charles and Northern Railroad Company, by (Signed) A. D. McDonald, Controller. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) Iberia and Vermilion Railroad Company, by (Signed) A. D. McDonald, Controller. Attest: (Signed) A. K. Van Deventer, Assistant Secretary. (Seal.)

[fol. 49] ANDREW K. VAN DEVENTER, of Elizabeth, New Jersey, Treasurer of the Southern Pacific Company, aged sixty-nine years and upwards, being duly and publicly sworn and examined on the part of the petitioner, doth depose and say as follows:

First. State your name, age, residence and present occupation.

First. To the first interrogatory he saith: My name is Andrew K. Van Deventer; my age is sixty-nine years; I reside in Elizabeth, New Jersey; my present occupation is treasurer of the Southern Pacific Company.

Second. What position or positions did you occupy between August 1, 1918, and August 1, 1924?

Second. To the second interrogatory he saith: I have occupied the same position since August 1, 1918, up to the present time.

Third. At or about the time when, or at some time after, the Railroad Administration took over the properties of the Southern Pacific Company and its subsidiaries in pursuance of the Act of Congress of August 26, 1916, Chapter 418, Paragraph 1, 39 Stats. 645, and of the proclamation of the President of December 16, 1917, was there an agreement in writing entered into by and between the Southern Pacific Company and/or its subsidiaries with the United States?

Third. To the third interrogatory he saith: There was such an [fol. 50] agreement entered into as is mentioned in the third interrogatory. My only connection with it was to attest the seal of one of the subsidiaries joined with the Southern Pacific Company in the agreement, namely, Iberia & Vermilion Railroad Company, of which company I was Assistant Secretary.

Fourth. If you answer the third interrogatory in the affirmative, will you please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause?

Fourth. To the fourth interrogatory he saith: A true copy of the agreement has been or will be handed to the Commissioner by the witness Julius Kruttschnitt.

Fifth. After the loss of the steamship Proteus whilst in possession of the Director General of Railroads, were there any negotiations had between the Director General of Railroads and the Southern Pacific Company in connection with a payment to the Southern Pacific Company by or in behalf of the Director General of Railroads for the loss of the Proteus?

Fifth. To the fifth interrogatory he saith: I do not know anything about any negotiations such as are inquired about in the fifth interrogatory.

Sixth. If you answer the preceding interrogatory in the affirma- [fol. 51] tive, state when these negotiations began and by whom they were conducted on behalf of the Director General of Railroads and on behalf of the Southern Pacific Company?

Sixth. To the sixth interrogatory he saith: See my answer to the fifth interrogatory.

Seventh. Were any of these negotiations in writing in the form of letters, telegrams or other writings?

Seventh. To the seventh interrogatory he saith: See my answer to the fifth interrogatory.

Eighth. If you answer the preceding interrogatory in the affirmative, please produce true copies of any letters, telegrams, or other writings exchanged between the Director General of Railroads and/or any of his agents or employees, and the Southern Pacific Company and/or any of its agents or employees, in connection with such negotiations, and hand them to the Commissioner to be marked and used as exhibits in this cause.

Eighth. To the eighth interrogatory he saith: See my answer to the fifth interrogatory.

Ninth. If you state that there were negotiations had, as asked in the Fifth, Sixth, Seventh, and Eighth interrogatories, will you state whether, as a result of those negotiations, there was any agreement reached as to the amount which should be paid by the Railroad Administration to the Southern Pacific Company for the loss of the Proteus?

Ninth. To the ninth interrogatory he saith: I do not know any- [fol. 52] thing about the negotiations such as are inquired about in the ninth interrogatory. I do not know what, if any, agreement was reached as to the amount which should be paid by the Railroad Administration to the Southern Pacific Company for the loss of the Proteus.

Tenth. If you answer the Ninth Interrogatory in the affirmative, will you please state when such an agreement was reached and what amount the Director General of Railroads agreed to pay to the Southern Pacific Company for the loss of the Proteus?

Tenth. To the tenth interrogatory he saith: See my answer to the ninth interrogatory.

Eleventh. Was there any written contract entered into by and between the Director General of Railroads and the Southern Pacific

Company embodying he agreement mentioned in the Ninth and Tenth Interrogatories?

Eleventh. To the eleventh interrogatory he saith: Not that I know of. See my answers to ninth and tenth interrogatories.

Twelfth. If you answer the Eleventh Interrogatory in the affirmative, please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

Twelfth. To the twelfth interrogatory he saith: See my answer to the preceding interrogatory.

[fol. 53] Thirteenth. If there was not any formal written agreement, please produce any letters, telegrams, or other documents or writings which may have embodied the final agreement by and between the Director General of Railroads and the Southern Pacific Company as to the amount which was to be paid for the loss of the Proteus?

Thirteenth. To the thirteenth interrogatory he saith: I know of no such letters, telegrams or other documents or writings embodying any final agreement between the Director General of Railroads and the Southern Pacific Company as to the amount which was to be paid for the loss of the Proteus.

Fourteenth. If you answer the Ninth and Tenth Interrogatories in the negative, state whether or not an item representing the amount to be paid for the loss of the Proteus appeared in any schedule of items embodied in any general settlement between the Director General of Railroads and the Southern Pacific Company?

Fourteenth. To the fourteenth interrogatory he saith: Not that I know of. I had nothing to do with any negotiations or the making of any agreement between the Director General of Railroads and the Southern Pacific Company concerning the Proteus or any other matter.

Fifteenth. If you answer the Fourteenth Interrogatory in the affirmative, state the amount of the item representing the amount to be paid for the loss of the Proteus.

[fol. 54] Fifteenth. To the fifteenth interrogatory he saith: See my answer to interrogatory fourteenth.

Sixteenth. If you state an amount in answer to the Ninth and Tenth Interrogatories and/or in answer to the Fourteenth and Fifteenth Interrogatories which fixed the amount of payment to be made for the loss of the Proteus, state whether or not that amount included interest from the date of the loss, and if it did, whether any other or further payment was made on account of interest on the same amount.

Sixteenth. To the sixteenth interrogatory he saith: See my answers to interrogatories ninth, tenth, fourteenth and fifteenth.

Seventeenth. If in answer to the Ninth and Tenth Interrogatories and/or the Fourteenth and Fifteenth Interrogatories, you have stated an amount agreed to be made as a payment for the loss of the Proteus,

(a) State whether or not in arriving at that amount you took into consideration the value of the Proteus which had been fixed by

the Commissioner and by the United States District Court for the Southern District of New York in this litigation?

(b) If you did not take into consideration the value of the Proteus fixed by the Commissioner and the said United States District Court in this case, will you state on what you based the amount [fol. 55] which was agreed on to be paid by the Director General of Railroads to the Southern Pacific Company for the loss of the Proteus.

Seventeenth. To the seventeenth interrogatory he saith I have not stated an amount in answer to the ninth or tenth or fourteenth or fifteenth interrogatories.

Eighteenth. Was the agreed amount to be paid for the loss of the Proteus ever paid by the Director General of Railroads to the Southern Pacific Company?

Eighteenth. To the eighteenth interrogatory he saith: I have no knowledge or information about any agreed amount to be paid for the loss of the Proteus or about any payment of any amount by the Director General of Railroads to the Southern Pacific Company for the loss of the Proteus.

Nineteenth. If you answer the Eighteenth Interrogatory in the affirmative, will you state the date of this payment, the total amount thereof, and the person to whom it was made?

Nineteenth. To the nineteenth interrogtory he saith: I have not answered the eighteenth interrogatory in the affirmative.

Twentieth. Was there any final written agreement of settlement made between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other?

Twentieth. To the twentieth interrogatory he saith: Yes, as I am informed.

[fol. 56] Twenty-first. If you answer the Twentieth Interrogatory in the affirmative, will you state when this final agreement of settlement was made and by whom it was signed on behalf of the several parties?

Twenty-first. To the twenty-first interrogatory he saith: I understand that a true copy of this agreement of settlement has been or will be handed to the Commissioner by the witness Julius Kruttschnitt. This copy will show by whom it was signed on behalf of the several parties.

Twenty-second. If you state there was such an agreement, will you please produce a true copy thereof and hand it to the Commissioner to be marked as an exhibit and used in this cause?

Twenty-second. To the twenty-second interrogatory he saith: See my answer to interrogatory twenty-first.

Twenty-third. If it is a fact that there was a lump sum settlement made by and between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other, will you state what the amount of that lump sum settlement was and what was allowed in such lump sum settlement on account of the loss of the steamship Proteus?

Twenty-third. To the twenty-third interrogatory he saith: I had nothing to do with the settlement between the Director General on the one hand and the Southern Pacific and its subsidiaries on the [fol. 57] other. I do not know whether or not any lump sum settlement that may have been made contained any allowance on account of the loss of the steamship Proteus. I have never heard or been informed by anyone that any lump sum settlement contained any such allowance on account of the loss of the Proteus.

Twenty-fourth. In pursuance of the final settlement, were there any releases exchanged by and between the Railroad Administration and the Southern Pacific Company and its subsidiary companies?

Twenty-fourth. To the twenty-fourth interrogatory he saith: So far as I know the final written agreement, a true copy of which has been or will be handed to the Commissioner by the witness Julius Kruttschnitt, contains the settlement between the Director General of Railroads and the Southern Pacific Company and its subsidiary companies. I have never heard of any exchange of releases between the parties, except such as may be contained in the document designated as the final written agreement of settlement.

Twenty-fifth. If you answer the Twenty-fourth Interrogatory in the affirmative, will you please produce and hand to the Commissioner to be marked and used as exhibits a true copy or copies of any and all such releases?

Twenty-fifth. To the twenty-fifth interrogatory he saith: See my answer to interrogatory twenty-fourth.

[fol. 58] Twenty-sixth. (a) Were there any oral negotiations on the subject of the value of the Proteus?

(b) If so, where did they occur and between what persons were they held?

Twenty-sixth. To the Twenty-sixth interrogatory he saith: I do not know.

Twenty-seventh. (a) During the negotiations was either the Director General of Railroads or the Southern Pacific Company represented by any lawyer?

(b) If so, what was the name of the lawyer representing the Director General of Railroads and what was the name of the lawyer representing the Southern Pacific Company?

(c) If you state that there were lawyers and give their names, will you please state to what firm or firms the said lawyers belonged?

Twenty-seventh. To the twenty-seventh interrogatory he saith: I do not know.

Twenty-eighth. Did the Southern Pacific Company receive any letters from counsel for the Director General of Railroads regarding any negotiations for settlement of the loss of the Proteus?

Twenty-eighth. To the twenty-eighth interrogatory he saith: I do not know.

Twenty-ninth. If it did, will you please produce a true copy of such letter or letters and hand them to the Commissioner to be [fol. 59] marked and used in this cause?

Twenty-ninth. To the twenty-ninth interrogatory he saith: See my answer to interrogatory twenty-eighth.

Thirtieth. If there are within your knowledge any other facts or circumstances or writing in connection with said agreement on the amount which was paid for the loss of the Proteus or the actual payment made by the Director General for the loss of the Proteus, about which you have not been specifically interrogated in the foregoing interrogatories, state fully such facts and circumstances as are within your knowledge and produce any such writings to be marked by the Commissioner and used as exhibits herein.

Thirtieth. To the thirtieth interrogatory he saith: My only connection with the matters covered by the foregoing interrogatories was that as Assistant Secretary of the Iberia & Vermilion Railroad Company I affixed the corporate seal of that company to the contract between the Director General and the Southern Pacific Company and its subsidiary companies, and also to the agreement of settlement referred to in interrogatory twentieth.

There were no cross-interrogatories.

Andrew K. Van Deventer.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 27th day of June, 1924, before

Wm. Parkin, Commissioner

[fol. 60] Hugh Neill, of New York City, Secretary of the Southern Pacific Company, aged forty-eight years and upwards, being duly and publicly sworn and examined on the part of the petitioner, doth depose and say as follows:

First. State your name, age, residence and present occupation.

First. To the first interrogatory he saith: My name is Hugh Neill; age forty-eight years; residence, New York City; present occupation, Secretary of the Southern Pacific Company.

Second. What position or positions did you occupy between August 1, 1918 and August 1, 1924?

Second. To the second interrogatory he saith: I occupied the same position on August 1, 1918 and continuously up to the present time.

Third. At or about the time when, or at some time after, the Railroad Administration took over the properties of the Southern Pacific Company and its subsidiaries in pursuance of the Act of Congress of August 26, 1916, Chapter 418, Paragraph 1, 39 Stats. 645, and of the proclamation of the President of December 16, 1917, was there an agreement in writing entered into by and between the Southern Pacific Company and/or its subsidiaries with the United States?

[fol. 61] Third. To the third interrogatory he saith: There was an agreement of the character referred to in the third interrogatory, entered into between the Director General of Railroads and the Southern Pacific Company and certain named subsidiaries, pursuant to the Federal Control Act of March 21, 1918.

Fourth. If you answer the third interrogatory in the affirmative,

will you please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause?

Fourth. To the fourth interrogatory he saith: A true copy of such agreement has been handed to the Commissioner by the witness Julius Kruttschnittt.

Fifth. After the loss of the steamship Proteus whilst in possession of the Director General of Railroads, were there any negotiations had between the Director General of Railroads and the Southern Pacific Company in connection with a payment to the Southern Pacific Company by or in behalf of the Director General of Railroads for the loss of the Proteus?

Fifth. To the fifth interrogatory he saith: I have no knowledge or information concerning any negotiations of the character referred to in the fifth interrogatory.

Sixth. If you answer the preceding interrogatory in the affirmative, state when these negotiations began and by whom they were [fol. 62] conducted on behalf of the Director General of Railroads and on behalf of the Southern Pacific Company?

Sixth. To the sixth interrogatory he saith: See my answer to the fifth interrogatory.

Seventh: Were any of these negotiations in writing in the form of letters, telegrams, or other writings?

Seventh. To the seventh interrogatory he saith: See my answer to the fifth interrogatory.

Eighth. If you answer the preceding interrogatory in the affirmative, please produce true copies of any letters, telegrams, or other writings exchanged between the Director General of Railroads and/or any of his agents or employees, and the Southern Pacific Company and/or any of its agents or employees, in connection with such negotiations, and hand them to the Commissioner to be marked and used as exhibits in this cause.

Eighth. To the eighth interrogatory he saith: See my answer to the fifth interrogatory.

Ninth. If you state that there were negotiations had, as asked in the Fifth, Sixth, Seventh and Eighth Interrogatories, will you state whether, as a result of those negotiations, there was any agreement reached as to the amount which should be paid by the Railroad Administration to the Southern Pacific Company for the loss of the Proteus?

Ninth. To the ninth interrogatory he said: I have no knowledge [63] or information respecting any agreement of the character referred to in the ninth interrogatory.

Tenth. If you answer the Ninth Interrogatory in the affirmative, will you please state when such an agreement was reached and what amount the Director General of Railroads agreed to pay to the Southern Pacific Company for the loss of the Proteus?

Tenth. To the tenth interrogatory he saith: See my answer to the ninth interrogatory.

Eleventh. Was there any written contract entered into by and between the Director General of Railroads and the Southern Pacific

Company, embodying the agreement mentioned in the Ninth and Tenth Interrogatories:

Eleventh. To the eleventh interrogatory he saith: See my answer to the ninth interrogatory.

Twelfth. If you answer the Eleventh Interrogatory in the affirmative, please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

Twelfth. To the twelfth interrogatory he saith: See my answer to the ninth interrogatory.

Thirteenth. If there was not any formal written agreement, please produce any letters, telegrams, or other documents or writings which may have embodied the final agreement by and between the Director General of Railroads and the Southern Pacific [fol. 64] Company as to the amount which was to be paid for the loss of the Proteus.

Thirteenth. To the thirteenth interrogatory he saith:

I have not in my possession or control any letters, telegrams or other documents or writings which may have embodied any final agreement by and between the Director General of Railroads and the Southern Pacific Company as to the amount which was to be paid for the loss of the Proteus.

Fourteenth. If you answer the Ninth and Tenth Interrogatories in the negative, state whether or not an item representing the amount to be paid for the loss of the Proteus appeared in any schedule of items embodied in any general settlement between the Director General of Railroads and the Southern Pacific Company?

Fourteenth. To the fourteenth interrogatory he saith: I do not know. I had nothing to do with any general settlement between the Director General and the Southern Pacific Company.

Fifteenth. If you answer the Fourteenth Interrogatory in the affirmative, state the amount of the item representing the amount to be paid for the loss of the Proteus.

Fifteenth. To the fifteenth interrogatory he saith: I have not answered the fourteenth interrogatory in the affirmative.

Sixteenth. If you state an amount in answer to the Ninth and [fol. 65] Tenth Interrogatories and/or in answer to the Fourteenth and Fifteenth Interrogatories which fixed the amount of payment to be made for the loss of the Proteus, state whether or not that amount included interest from the date of the loss, and if it did, whether any other or further payment was made on account of interest on the said amount.

Sixteenth. To the sixteenth interrogatory he saith: I have not stated an amount in answer to the ninth or tenth or fourteenth or fifteenth interrogatories.

Seventeenth: If in answer to the Ninth and Tenth Interrogatories and/or the Fourteenth and Fifteenth Interrogatories, you have stated an amount agreed to be made as a payment for the loss of the Proteus,

(a) State whether or not in arriving at that amount you took into consideration the value of the Proteus which had been fixed by the Commissioner and by the United States District Court for the Southern District of New York in this litigation?

(b) If you did not take into consideration the value of the Proteus fixed by the Commissioner and the said United States District Court in this case, will you state on what you based the amount to be paid by the Director General of Railroads to the Southern Pacific Company for the loss of the Proteus.

[fol. 66] Seventeenth. To the seventeenth interrogatory he saith: I have not stated an amount in answer to the ninth or tenth or fourteenth or fifteenth interrogatories.

Eighteenth: Was the agreed amount to be paid for the loss of the Proteus ever paid by the Director General of Railroads to the Southern Pacific Company?

Eighteenth. To the eighteenth interrogatory he saith: I know nothing about any agreed amount to be paid for the loss of the Proteus, and know nothing about any payment thereof by the Director General of Railroads to the Southern Pacific Company.

Nineteenth. If you answer the Eighteenth Interrogatory in the affirmative, will you state the date of this payment, the total amount thereof, and the person to whom it was made?

Nineteenth. To the nineteenth interrogatory he saith: I have not answered the eighteenth interrogatory in the affirmative.

Twentieth. Was there any final written agreement of settlement made between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other?

Twentieth. To the twentieth interrogatory he saith: Yes, I am informed.

Twenty-first. If you answer the Twentieth Interrogatory in the affirmative, will you state when this final agreement of settlement [fol. 67] was made and by whom it was signed on behalf of the several parties?

Twenty-first. To the twenty-first interrogatory he saith: I understand that a true copy of the agreement of settlement has been handed to the Commissioner by the witness Julius Kruttschnitt, which copy will show by whom it was signed on behalf of the several parties.

Twenty-Second. If you state there was such an agreement, will you please produce a true copy thereof and hand it to the Commissioner to be marked as an exhibit and used in this cause?

Twenty-second. To the twenty-second interrogatory he saith: See my answer to interrogatory twenty-first.

Twenty-third. If it is a fact that there was a lump sum settlement made by and between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other, will you state what the amount of that lump sum settlement was and what was allowed in such lump sum settlement on account of the loss of the steamship Proteus?

Twenty-third. To the twenty-third interrogatory he saith: I had nothing to do with the settlement between the Director General on the one hand and the Southern Pacific Company and its subsidiary companies on the other, and I do not know whether or not

[fol. 68] any lump sum settlement that may have been made contained any allowance on account of the loss of the steamship Proteus.

Twenty-fourth. In pursuance of the final settlement were there any releases exchanged by and between the Railroad Administration and the Southern Pacific Company and its subsidiary companies?

Twenty-fourth. To the twenty-fourth interrogatory he saith: I am informed that the final written agreement, a true copy of which was handed to the Commissioner by the witness Julius Kruttschnitt in response to interrogatory twenty-second, contains whatever releases, if any, were exchanged between the Railroad Administration and the Southern Pacific Company.

Twenty-fifth. If you answer the Twenty-fourth interrogatory in the affirmative, will you please produce and hand to the Commissioner to be marked and used as exhibits a true copy or copies of any and all such releases?

Twenty-fifth. To the twenty-fifth interrogatory he saith: See my answer to interrogatory twenty-fourth.

Twenty-sixth. (a) Were there any oral negotiations on the subject of the value of the Proteus?

(b) If so, where did they occur and between what persons were they held?

Twenty-sixth. To the twenty-sixth interrogatory he saith: I do not know.

[fol. 69] Twenty-seventh. (a) During the negotiations was either the Director General of Railroads or the Southern Pacific Company represented by any lawyer?

(b) If so, what was the name of the lawyer representing the Director General of Railroads and what was the name of the lawyer representing the Southern Pacific Company?

(c) If you state that there were lawyers and give their names, will you please state to what firm or firms the said lawyers belonged?

Twenty-seventh. To the twenty-seventh interrogatory he saith: I do not know.

Twenty-eighth. Did the Southern Pacific Company receive any letters from counsel for the Director General of Railroads regarding any negotiations for settlement of the loss of the Proteus?

Twenty-eighth. To the twenty-eight interrogatory he saith: I do not know.

Twenty-ninth. If it did, will you please produce a true copy of such letter or letters and hand them to the Commissioner to be marked and used in this cause?

Twenty-ninth. To the Twenty-ninth interrogatory he saith: See my answer to interrogtory twenty-eighth.

Thirtieth. I there are within your knowledge any other facts or circumstances or writing in connection with said agreement on [fol. 70] the amount which was paid for the loss of the Proteus or the actual payment made by the Director General for the loss of the Proteus, about which you have not been specifically interrogated in the foregoing interrogatories, state fully such facts and circumstances as are within your knowledge and produce any such writing to be marked by the Commissioner and used as exhibits herein.

Thirtieth. To the thirtieth interrogatory he saith: My only connection with the subject matter of all these interrogatories was that as Secretary of the Company I was the custodian of the contract between the Director General and the Southern Pacific Company and its subsidiaries referred to in interrogatories third and fourth. and as Secretary and Assistant Secretary of the subsidiaries I affixed the corporate seals of said companies to said contract and also to the agreement of settlement referred to in interrogatory twentieth.

There were no cross-interrogatories.

Hugh Neill.

Examination taken, reduced to writing and by the witness subscribed and sworn to, this 27th day of June, 1924 before

Wm. Parkin, Commissioner.

[fol. 71] CARL W. JUNGEN, of New York City, Manager of the Southern Pacific Company's Atlantic Steamship Lines, aged sixty-five years and upwards, being duly and publicly sworn and examined on the part of the petitioner, doth depose and say as follows:

First. State your name, age, residence and present occupation.

First. To the first interrogatory he saith: My name is Carl W. Jungen; age sixty-five years. I reside at 2211 Broadway, New York City; and my present occupation is Manager of the Southern Pacific Company's Atlantic Steamship Lines.

Second. What position or positions did you occupy between August 1, 1918 and August 1, 1924?

Second. To the second interrogatory he saith: From August 1, 1918 up to March 1, 1920, end of Federal control, I was in the employ of the Director General of Railroads, acting as Assistant to Federal Manager of the Southern Pacific Steamship Lines and other coast lines, which had been taken over by the Director General. Since March 1, 1920 to August 1, 1924, I was Manager of the Southern Pacific Steamship Lines.

Third. At or about the time when, or at some time after the Railroad Administration took over the properties of the Southern Pacific Company and its subsidiaries in pursuance of the Act of [fol. 72] Congress of August 26, 1916, Chapter 418, Paragraph 1, 39 Stats. 645, and of the proclamation of the President of December 16, 1917, was there an agreement in writing entered into by and between the Southern Pacific Company and/or its subsidiaries with the United States?

Third. To the third interrogatory he saith: I had nothing to do with the making of any such agreement.

Fourth. If you answer the third interrogatory in the affirmative, will you please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause?

Fourth. To the fourth interrogatory he saith: I have no copy of any such agreement.

Fifth. After the loss of the steamship Proteus whilst in possession of the Director General of Railroads, were there any negotiations had between the Director General of Railroads and the Southern Pacific Company in connection with a payment to the Southern Pacific Company by or in behalf of the Director General of Railroads for the loss of the Proteus?

Fifth. To the fifth interrogatory he saith: The only negotiations that I know of between the Director General of Railroads and the Southern Pacific Company in connection with the loss of the Proteus, were negotiations which took place sometime in December, [fol. 73] 1922. The exact date I do not remember. These negotiations took place between Mr. Frank C. Wright, representing the Director General, and Mr. A. D. McDonald, Controller of the Southern Pacific Company, representing the Southern Pacific Company. He was assisted by Mr. J. P. Blair, the general counsel of that Company. There were also present assisting Mr. McDonald members if his accounting force. I was also present and took part in the negotiations. The subject matter of the negotiations was all claims of either the Director General during Federal control, i. e., from January 1, 1918, to March 1, 1920. Among these claims was one for the value of the Proteus. The negotiations were oral and continued for some time. No final agreement was arrived at. I understood the object of the negotiations was to enable Mr. Wright to make a report to the Director General on this branch of the general claim of the Southern Pacific Company growing out of the operation of its transportation system by the Director General. What report, if any, was made by Mr. Wright, I do not know.

Sixth. If you answer the preceding interrogatory in the affirmative, state when these negotiations began and by whom they were conducted on behalf of the Director General of Railroads and on behalf of the Southern Pacific Company?

[fol. 74] Sixth. To the sixth interrogatory he saith: See my answer to interrogatory fifth.

Seventh. Were any of these negotiations in writing in the form of letters, telegrams or other writings?

Seventh. To the seventh interrogatory he saith: See my answer to interrogatory fifth.

Eighth. If you answer the preceding interrogatory in the affirmative, please produce true copies of any letters, telegrams, or other writings exchanged between the Director General of Railroads and/or any of his agents or employees, and the Southern Pacific Company and/or any of its agents or employees, in connection with such negotiations, and hand them to the Commissioner to be marked and used as exhibits in this cause.

Eighth. To the eighth interrogatory he saith: See my answer to interrogatory fifth.

Ninth. If you state that there were negotiations had, as asked in the Fifth, Sixth, Seventh and Eighth Interrogatories, will you state whether, as a result of those negotiations, there was any agreement reached as to the amount which should be paid by the Rail-

road Administration to the Southern Pacific Company for the loss of the Proteus?

Ninth. To the ninth interrogatory he saith: See my answer to interrogatory fifth.

Tenth. If you answer the Ninth Interrogatory in the affirmative, [fol. 75] will you please state when such an agreement was reached and what amount the Director General of Railroads agreed to pay to the Southern Pacific Company for the loss of the Proteus?

Tenth. To the tenth interrogatory he saith: See my answer to interrogatory fifth.

Eleventh. Was there any written contract entered into by and between the Director General of Railroads and the Southern Pacific Company embodying the agreement mentioned in the Ninth and Tenth Interrogatories?

Eleventh. To the eleventh interrogatory he saith: No agreement was mentioned in answer to ninth or tenth interrogatories.

Twelfth. If you answer the Eleventh Interrogatory in the affirmative, please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

Twelfth. To the twelfth interrogatory he saith: I have not answered the eleventh interrogatory in the affirmative.

Thirteenth. If there was not any formal written agreement, please produce any letters, telegrams, or other documents or writings which may have embodied the final agreement by and between the Director General of Railroads and the Southern Pacific Company as to the [fol. 76] amount which was to be paid for the loss of the Proteus.

Thirteenth. To the thirteenth interrogatory he saith: To the best of my knowledge there was no final agreement between the Director General and the Southern Pacific Company as to the amount to be paid for the loss of the Proteus.

Fourteenth. If you answer the Ninth and Tenth Interrogatories in the negative, state whether or not an item representing the amount to be paid for the loss of the Proteus appeared in any schedule of items embodied in any general settlement between the Director General of Railroads and the Southern Pacific Company.

Fourteenth. To the fourteenth interrogatory he saith: See my answer to interrogatory thirteenth.

Fifteenth. If you answer the Fourteenth Interrogatory in the affirmative, state the amount of the item representing the amount to be paid for the loss of the Proteus.

Fifteenth. To the fifteenth interrogatory he saith: I have not answered the fourteenth interrogatory in the affirmative.

Sixteenth. If you state an amount in answer to the Ninth and Tenth Interrogatories and/or in answer to the Fourteenth and Fifteenth Interrogatories which fixed the amount of payment to be made for the loss of the Proteus, state whether or not that amount [fol. 77] included interest from the date of the loss, and if it did, whether any other or further payment was made on account of interest on the said amount.

Sixteenth. To the sixteenth interrogatory he saith: I have stated no amount in answer to the ninth or tenth or fourteenth or fifteenth interrogatories.

Seventeenth. If in answer to the Ninth and Tenth Interrogatories and/or the Fourteenth and Fifteenth Interrogatories, you have stated an amount agreed to be made as a payment for the loss of the Proteus.

(a) State whether or not in arriving at that amount you took into consideration the value of the Proteus which had been fixed by the Commissioner and by the United States District Court for the Southern District of New York in this litigation?

(b) If you did not take into consideration the value of the Proteus fixed by the Commissioner and the said United States District Court in this case, will you state on what you based the amount which was agreed on to be paid by the Director General of Railroads to the Southern Pacific Company for the loss of the Proteus.

Seventeenth. To the seventeenth interrogatory he saith: I have stated no amount in answer to the ninth or tenth or fourteenth or fifteenth interrogatories.

Eighteenth. Was the agreed amount to be paid for the loss of the [fol. 78] Proteus ever paid by the Director General of Railroads to the Southern Pacific Company?

Eighteenth. To the eighteenth interrogatory he saith: There was no agreed amount to be paid for the loss of the Proteus, that I know of.

Nineteenth. If you answer the Eighteenth Interrogatory in the affirmative, will you state the date of this payment, the total amount thereof, and the person to whom it was made?

Nineteenth. To the nineteenth interrogatory he saith: I have not answered the eighteenth interrogatory in the affirmative.

Twentieth. Was there any final written agreement of settlement made between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other?

Twentieth. To the twentieth interrogatory he saith: I had nothing to do with the final agreement between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other. I am informed that there was such agreement and that other witnesses will produce a true copy thereof and hand the same to the Commissioner.

Twenty-first. If you answer the Twentieth Interrogatory in the affirmative, will you state when this final agreement of settlement [fol. 79] was made and by whom it was signed on behalf of the several parties?

Twenty-first. To the twenty-first interrogatory he saith: See my answer to interrogatory twentieth.

Twenty-second. If you state there was such an agreement, will you please produce a true copy thereof and hand it to the Commissioner to be marked as an exhibit and used in this cause?

Twenty-second. To the twenty-second interrogatory he saith: See my answer to interrogatory twentieth.

Twenty-third. If it is a fact that there was a lump sum settlement made by and between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other, will you state what the amount of that lump sum settlement was and what was allowed in such lump sum settlement on account of the loss of the steamship Proteus?

Twenty-third. To the twenty-third interrogatory he saith: See my answer to interrogatory twentieth. I am informed that the amount of the lump sum settlement was $9,250,000. I do not know what, if anything, was allowed in such lump sum settlement on account of the loss of the steamship Proteus.

Twenty-fourth. In pursuance of the final settlement, were there [fol 80] any releases exchanged by and between the Railroad Administration and the Southern Pacific Company and its subsidiary companies?

Twenty-fourth. To the twenty-fourth interrogatory he saith: I had nothing to do with the exchange of releases, if any, between the Railroad Administration and the Southern Pacific Company and its subsidiary companies.

Twenty-fifth. If you answer the Twenty-fourth Interrogatory in the affirmative, will you please produce and hand to the Commissioner to be marked and used as exhibits a true copy or copies of any and all such releases?

Twenty-fifth. To the twenty-fifth interrogatory he saith: See my answer to previous interrogatory. I have not in my possession or control any copies of the documents called for.

Twenty-sixth. (a) Were there any oral negotiations on the subject of the value of the Proteus?

(b) If so, where did they occur and between what persons were they held?

Twenty-sixth. To the twenty-sixth interrogatory he saith: See my answer to interrogatory fifth.

Twenty-seventh. (a) During the negotiations was either the Director General of Railroads or the Southern Pacific Company represented by any lawyer?

(b) If so, what was the name of the lawyer representing the Di- [fol. 81] rector General of Railroads and what was the name of the lawyer representing the Southern Pacific Company?

(c) If you state that there were lawyers and give their names, will you please state to what firm or firms the said lawyers belonged?

Twenty-seventh. To the twenty-seventh interrogatory he saith: During the negotiations referred to in interrogatory twenty-sixth and in my answer to interrogatory fifth, to the best of my recollection the Director General was not represented by any lawyer. The Southern Pacific Company was represented by its general counsel, J. P. Blair.

Twenty-eighth. Did the Southern Pacific Company receive any letters from counsel for the Director General of Railroads regarding any negotiations for settlement of the loss of the Proteus?

Twenty-eighth. To the twenty-eighth interrogatory he saith: None that I know of.

Twenty-ninth. If it did, will you please produce a true copy of such letter or letters and hand them to the Commissioner to be marked and used in this cause?

Twenty-ninth. To the twenty-ninth interrogatory he saith: See my answer to interrogatory twenty-eighth.

Thirtieth. If there are within your knowledge any other facts or circumstances or writing in connection with said agreement on the amount which was paid for the loss of the Proteus or the actual pay-[fol. 82] ment made by the Director General for the loss of the Proteus, about which you have not been specifically interrogated in the foregoing interrogatories, state fully such facts and circumstances as are within your knowledge and produce any such writings to be marked by the Commissioner and used as exhibits herein.

Thirtieth. To the thirtieth interrogatory he saith: No; I have nothing further to add.

There were no cross-interrogatories.

C. W. Jungen.

Examination taken, reduced to writing and by the witness subscribed and sworn to, this 27th day of June, 1924, before

Wm. Parkin, Commissioner.

[fol. 83] Frank C. Wright, of Bristol Tennessee, banker; aged fifty-two years and upwards, being duly and publicly sworn and examined on the part of the petitioner, doth depose and say as follows:

First. State your name, age, residence and present occupation.

First. To the first interrogatory he saith: Frank C. Wright; age fifty-two; residence, Bristol, Tennessee; present occupation banking; Vice President of the Bangor & Aroostock Railroad; Vice President of the Benedict Coal Corporation and connected with other railroads and business corporations.

Second. What position or positions did you occupy between August 1, 1918, and August 1, 1924?

Second. To the second interrogatory he saith: From August 1, 1918, to March 1, 1920, I was Assistant Director of Operations United States Railroad Administration in charge of marine matters. After March 1, 1920, I became Vice President of the Bangor & Aroostook Railroad and of the Benedict Coal Corporation and assisted the Director General of Railroads in various liquidation matters as an unofficial adviser. In December, 1921, I came to New York with Lee, Higginson & Company, where I now am.

Third. At or about the time when, or at some time after the Rail-[fol. 84] road Administration took over the properties of the Southern Pacific Company and its subsidiaries in pursuance of the Act of Congress of August 26, 1916, Chapter 418, Paragraph 1, 39 Stat. 645, and of the proclamation of the President of December 16, 1917, was there an agreement in writing entered into by and between the

Southern Pacific Company and/or its subsidiaries with the United States?

Third. To the third interrogatory he saith: Yes.

Fourth. If you answer the Third Interrogatory in the affirmative, will you please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

Fourth. To the fourth interrogatory he saith: I understand it has already been produced. It is a part of the Federal records at Washington which I cannot procure.

Fifth. After the loss of the steamship Proteus whilst in possession of the Director General of Railroads on August 19, 1918, were there any negotiations had between the Director General of Railroads and the Southern Pacific Company in connection with a payment to the Southern Pacific Company by and in behalf of the Director General of Railroads for the loss of the Proteus?

Fifth. To the fifth interrogatory he saith: Yes.

Sixth. If you answer the preceding interrogatory in the affirmative, state when these negotiations began and by whom they were con- [fol. 85] ducted on behalf of the Director General of Railroads and on behalf of the Southern Pacific Company.

Sixth. To the sixth interrogatory he saith: a. Mr. A. D. McDonald, Controller of the Southern Pacific Company, discussed with me their claim for the loss of the steamship Proteus and the lighter confidence.

b. In November, 1922, when the negotiations for the settlement of the whole claim of the Southern Pacific Company and its subsidiary companies against the Director General and the counterclaim of the Director General against the Southern Pacific Company was under discussion.

Seventh. Were any of these negotiations in writing in the form of letters, telegrams or other writings?

Seventh. To the seventh interrogatory he saith: No; except a formal letter from L. J. Spence, Director of Traffic of the Southern Pacific Company, asking the Railroad Administration to take steps to value the vessel property loss. I replied to this that the matter would be taken up as part of the general settlement at the end of Federal control. Do not remember the dates of the two letters. They are undoubtedly on the files of the Railroad Administration.

Eighth. If you answer the preceding interrogatory in the affirmative, please produce true copies of any letters, telegrams, or other writings exchanged between the Director General of Railroads and/or any of his agents or employees, and the Southern Pacific Company [fol. 86] and/or any of its agents or employees, in connection with such negotiations, and hand them to the Commissioner to be marked and used as exhibits in this cause.

Eighth. To the eighth interrogatory he saith: I have no letters. They must be on file in Washington as they are official records of the Federal Government and not under my control.

Ninth. If you state that there were negotiations had, as asked in the Fifth, Sixth, Seventh and Eighth Interrogatories, will you state

whether, as a result of those negotiations, there was any agreement reached as to the amount which should be paid by the Railroad Administration to the Southern Pacific Company for the loss of the Proteus?

Ninth. To the ninth interrogatory he saith: No.

Tenth. If you answer the Ninth Interrogatory in the affirmative, will you please state when such an agreement was reached and what amount the Director General of Railroads agreed to pay to the Southern Pacific Company for the loss of the Proteus.

Tenth. To the tenth interrogatory he saith: I have not answered interrogatory ninth in the affirmative.

Eleventh. Was there any written contract entered into by and between the Director General of Railroads and the Southern Pacific Company embodying the agreement mentioned in the Ninth and Tenth Interrogatories?

[fol. 87] Eleventh. To the eleventh interrogatory he saith: No.

Twelfth. If you answer the Eleventh Interrogatory in the affirmative, please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

Twelfth. To the twelfth interrogatory he saith: I have not answered the eleventh in the affirmative.

Thirteenth. If there was not any formal written agreement, please produce any letters, telegrams, or other documents or writings which may have embodied the final agreement by and between the Director General of Railroads and the Southern Pacific Company as to the amount which was to be paid for the loss of the Proteus.

Thirteenth. To the thirteenth interrogatory he saith: I know of none.

Fourteenth. If you answer the Ninth and Tenth Interrogatories in the negative, state whether or not an item representing the amount to be paid for the loss of the Proteus appeared in any schedule of items embodied in any general settlement between the Director General of Railroads and the Southern Pacific Company?

Fourteenth. To the fourteenth interrogatory he saith: No.

Fifteenth. If you answer the Fourteenth Interrogatory in the affirmative, state the amount of the item representing the amount to be paid for the loss of the Proteus.

[fol. 88] Fifteenth. To the fifteenth interrogatory he saith: I have not answered the fourteenth in the affirmative.

Sixteenth. If you state an amount in answer to the Ninth and Tenth Interrogatories and/or in answer to the Fourteenth and Fifteenth Interrogatories which fixed the amount of payment to be made for the loss of the Proteus, state whether or not that amount included interest from the date of the loss, and if it did not, whether any other or further payment was made on account of interest on the said amount.

Sixteenth. To the sixteenth interrogatory he saith: I have not stated an amount in answer to the ninth, tenth, fourteenth or fifteenth interrogatories.

Seventeenth. If in answer to the Ninth and Tenth Interrogatories

and/or the Fourteenth and Fifteenth Interrogatories, you have stated an amount agreed to be made as a payment for the loss of the Proteus,

(a) State whether or not in arriving at that amount you took into consideration the value of the Proteus which had been fixed by the Commissioner and by the United States District Court for the Southern District of New York in this litigation?

(b) If you did not take into consideration the value of the Proteus fixed by the Commissioner and the said United States District Court [fol. 89] in this case, will you state on what you based the amount to be paid by the Director General of Railroads to the Southern Pacific Company for the loss of the Proteus.

Seventeenth. To the seventeenth interrogatory he saith: See answer to the sixteenth interrogatory.

Eighteenth. Was the agreed amount to be paid for the loss of the Proteus ever paid by the Director General of Railroads to the Southern Pacific Company?

Eighteenth. To the eighteenth interrogatory he saith: See answer to the sixteenth interrogatory.

Nineteenth. If you answer the Eighteenth Interrogatory in the affirmative, will you state the date of this payment, the total amount thereof, and the person to whom it was made?

Nineteenth. To the nineteenth interrogatory he saith: See answer to the sixteenth interrogatory.

Twentieth. Was there any final written agreement of settlement made between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other?

Twentieth. To the twentieth interrogatory he saith: Yes.

Twenty-first. If you answer the Twentieth Interrogatory in the affirmative, will you state when this final agreement of settlement was made and by whom it was signed on behalf of the several parties? [fol. 90] Twenty-first. To the twenty-first interrogatory he saith: The agreement is dated December 19, 1922, and is signed by James C. Davis, Director General, Julius Kruttschnitt, Chairman of the Executive Committee of the Southern Pacific Company, Hugh Neill, Secretary of the Southern Pacific Company and Assistant Secretary of subsidiary companies, and A. D. McDonald, Controller of the Southern Pacific Company.

Twenty-second. If you state there was such an agreement, will you please produce a true copy thereof and hand it to the Commissioner to be marked as an exhibit and used in this cause?

Twenty-second. To the twenty-second interrogatory he saith: I understand a copy has already been produced. It is part of the Federal records and not under my control.

Twenty-third. If it is a fact that there was a lump sum settlement made by and between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other, will you state what the amount of that lump sum settlement was and what was allowed in such lump sum settlement on account of the loss of the steamship Proteus?

Twenty-third. To the twenty-third interrogatory he saith: I think the lump sum agreed on in the settlement with the Southern Pacific [fol. 91] Company was $9,250,000. I cannot state what was allowed on account of the loss of the steamship Proteus.

Twenty-fourth. In pursuance of the final settlement, were there any releases exchanged by and between the Railroad Administration and the Southern Pacific Company and its subsidiary companies?

Twenty-fourth. To the twenty-fourth interrogatory he saith: The only releases I know of are those contained in the agreement covering the settlement referred to in the twenty-first and twenty-second interrogatories.

Twenty-fifth. If you answer the Twenty-fourth interrogatory in the affirmative, will you please produce and hand to the Commissioner to be marked and used as exhibits a true copy or copies of any and all such releases?

Twenty-fifth. To the twenty-fifth interrogatory he saith: I have not answered the twenty-fourth interrogatory in the affirmative.

Twenty-sixth. (a) Were there any oral negotiations on the subject of the value of the Proteus?

(b) If so, where did they occur and between what persons were they held?

Twenty-sixth. To the twenty-sixth interrogatory he saith: a. I had a conference with Mr. A. D. McDonald, Controller of the Southern Pacific Company, on the subject of the value of the Proteus. [fol. 92] b. It occurred in November, 1922, in Washington at the offices of the Railroad Administration.

Twenty-seventh. (a) During the negotiations was either the Director General of Railroads or the Southern Pacific Company represented by any lawyer?

(b) If so, what was the name of the lawyer representing the Director General of Railroads and what was the name of the lawyer representing the Southern Pacific Company?

(c) If you state that there were lawyers and give their names, will you please state to what firm or firms the said lawyers belonged?

Twenty-seventh. To the twenty-seventh interrogatory he saith:

a. During the early part of the conference Hon. A. W. Smith, of Atlanta, who was then one of the special counsel of the Railroad Administration, was present; Mr. J. P. Blair, general counsel of the Southern Pacific Company, was present with Mr. McDonald.

b. I have given the names of the lawyers.

c. I understand that Mr. Smith is a member of a firm in Atlanta, Georgia, and that Mr. Blair is not a member of any firm. I do not recall the name of Mr. Smith's firm in Atlanta.

Twenty-eighth. Did the Director General of Railroads receive any [fol. 93] letters written by a lawyer or lawyers representing the Southern Pacific Company regarding a settlement for the loss of the Proteus?

Twenty-eighth. To the twenty-eighth interrogatory he saith: Not that I know of.

Twenty-ninth. If he did, will you please produce a true copy of

such letter or letters and hand them to the Commissioner to be marked and used in this cause.

Twenty-ninth. To the twenty-ninth interrogatory he saith: See my answer to the twenty-eighth interrogatory.

Thirtieth. If there are within your knowledge any other facts or circumstances or writing in connection with said agreement on the amount which was paid for the loss of the Proteus or the actual payment made by the Director General for the loss of the Proteus, about which you have not been specifically interrogated in the foregoing interrogatories, state fully such facts and circumstances as are within your knowledge and produce any such writings to be marked by the Commissioner and used as exhibits herein.

Thirtieth. To the thirtieth interrogatory he saith: I am not advised of the details of the settlement referred to nor of the extent to which the Director General used my recommendations.

There were no cross-interrogatories.

Frank C. Wright.

Examination taken, reduced to writing, and by the witness sub-
[fol. 94] scribed and sworn to, this 8th day of July, 1924, before
Wm. Parkin, Commissioner.

[fol. 95] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 607

STANDARD OIL COMPANY (NEW JERSEY), Petitioner,

vs.

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads, Respondents

Depositions of witnesses produced, sworn and examined, the first day of July, in the year One Thousand Nine Hundred and Twenty-four, at Washington, in the District of Columbia, under and by virtue of an order issued out of the Supreme Court of the United States in a certain cause therein pending and at issue, wherein Standard Oil Company of New Jersey is Petitioner and Southern Pacific Company and James C. Davis, Director General of Railroads are Respondents, as follows:

JAMES C. DAVIS, aged 66 years and upwards, being duly and publicly sworn and examined on the part of the Petitioner, does depose and say as follows:

First. State your name, age, residence and present occupation.
[fol. 96] First. To the first interrogatory he saith: My name is

James C. Davis; I am 66 years old; I am the Director General of the Railroads and Agent of the President engaged in liquidating the liabilities of the Government growing out of and connected with Federal control; and I reside in the City of Washington.

Second. What position or positions did you occupy between August 1, 1918 and August 1, 1924?

To the second interrogatory he saith: August 1st, I was General Solicitor for the Chicago & Northwestern Railway Company at Chicago and the legal adviser of R. H. Ashton, Regional Director, under the Director General. I came to Washington June 15, 1920, as general counsel for John Barton Payne, then acting Director General. On the 28th of March, 1921, I was appointed Director General and Agent for the President, and since that time I have occupied that position.

Third. At or about the time when, or at some time after, the Railroad Administration took over the properties of the Southern Pacific Company and its subsidiaries in pursuance of the Act of Congress of August 26, 1916, Chapter 418, Paragraph 1, 39 Stat. 645, and of the proclamation of the President of December 16, 1917, was there an agreement in writing entered into by and between the Southern Pacific Company and/or its subsidiaries with the United States?

To the third interrogatory he saith: Yes.

[fol. 97] Fourth. If you answer the Third Interrogatory in the affirmative, will you please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

To the fourth interrogatory he saith: Yes, a true copy is herewith handed to the Commissioner, to be marked Exhibit A as part of this answer.

(The paper referred to was so marked and is attached to and made a part of this deposition.)

Fifth. After the loss of the steamship Proteus whilst in possession of the Director General of Railroads on August 19, 1918, were there any negotiations had between the Director General of Railroads and the Southern Pacific Company in connection with a payment to the Southern Pacific Company by and in behalf of the Director General of Railroads for the loss of the Proteus?

To the fifth interrogatory he saith: Yes.

Sixth. If you answer the preceding interrogatory in the affirmative, state when these negotiations began and by whom they were conducted on behalf of the Director General of Railroads and on behalf of the Southern Pacific Company.

To the sixth interrogatory he saith: The final settlement with the Southern Pacific Company was the subject of investigation for several months prior to December 19th, 1922. This settlement involved a [fol. 98] claim on the part of the Southern Pacific Company, growing out of the use and operation of its property during the period of Federal control, which aggregated $54,252,694.57, and included in this claim was the claim for the loss of the Steamship Proteus. The

negotiations leading up to the final settlement were conducted solely by the Director General and his staff. The staff was composed of the late E. M. Alvord, Director Division Liquidation of Claims; Alex. W. Smith, Special Counsel; L. J. Tracy, Comptroller and D. C. Porteous, Director Division on Finance. The negotiations leading to a final settlement covered a number of meetings and conferences from perhaps the 20th of November to the date of the final settlement, December 19th, 1922.

The Southern Pacific was represented by a number of its managing officers, including A. D. McDonald, its Vice-President and Controller, and J. P. Blair, General Counsel; and before the final adjustment was agreed upon, Mr. Kruttschnitt, Chairman of the Executive Board appeared before the staff.

Seventh. Were any of these negotiations in writing in the form of letters, telegrams or other writings?

In answer to the seventh interrogatory he saith: None of the negotiations were in writing, and all were had in oral conferences.

Eighth. If you answer the preceding interrogatory in the affirma-
[fol. 99] tive, please produce true copies of any letters, telegrams, or other writings exchanged between the Director General of Railroads and/or any of his agents or employees, and the Southern Pacific Company and/or any of its agents or employees, in connection with such negotiations, and hand them to the Commissioner to be marked and used as exhibits in this cause.

In answer to the eighth interrogatory he saith: So far as I am advised, there were no written communications such as requested in the foregoing interrogatory.

Ninth. If you state that there were negotiations had, as asked in the Fifth, Sixth, Seventh and Eighth Interrogatories, will you state whether, as a result of those negotiations, there was any agreement reached as to the amount which should be paid by the Railroad Administration to the Southern Pacific Company for the loss of the Proteus?

In answer to the ninth interrogatory he saith: Included in the property of the Southern Pacific Company taken over by the Government were the Steamship Proteus and other property owned and operated by the railroad known as the Atlantic Steamship Lines. A list of the property and ships included in the Atlantic Steamship Lines property taken over is found in Section 2 of the standard contract, copy of which is attached to the answer to Interrogatory 4. During Federal control the Lighter Confidence and the Steamship Proteus were sunk. In this connection, there were claims made by
[fol. 100] the Southern Pacific Company for under maintenance of the floating equipment and property taken over by the Government as part of the Atlantic Steamship Lines, and claims for excess maintenance against the Company by the Government on account of this property. On or about the 20th of November, 1922, a conference was had between Mr. Frank C. Wright and other representatives of the Railroad Administration (Mr. Wright represented the Railroad Administration in admiralty matters) and Mr. A. D. McDonald, Vice-

President and Controller of the Southern Pacific Company, and other representatives of the Company. This conference was for the purpose of enabling Mr. Wright to recommend to the Director General and his Staff his view of a fair adjustment of the disputed items in the claim of the Southern Pacific Company covering the destruction of the Barge Confidence, the loss of the Steamship Proteus, and the disputed items of over and under maintenance. As a result of this conference, Mr. Wright recommended to the Director General and his Staff the following adjustment of the items above referred to:

Allowance to the Company for undermaintenance of terminals, $20,000.00. Allowance to the Director General for excess maintenance of floating equipment, $235,000.00. This was a net allowance to the Railroad Administration of $215,000.00 excess maintenance.

It was further recommended that the Railroad Administration [fol. 101] allow the Company for the value of the Steamship Proteus and the Lighter Confidence a lump sum of $885,000.00. It is perhaps fair to state that the amount claimed for the loss of the Lighter Confidence was $16,664.00.

As a result of these various credits, and debits, it was recommended by Mr. Wright that the Director General allow the Southern Pacific Company the sum of $670,000.00. This recommendation made by Mr. Wright was for the purpose of assisting the Director General and his staff in concluding a final adjustment of all the claims which the Southern Pacific Company was making against the Government for the use of its property during the period of Federal control.

Tenth. If you answer the Ninth Interrogatory in the affirmative, will you please state when such an agreement was reached and what amount the Director General of Railroads agreed to pay to the Southern Pacific Company for the loss of the Proteus.

In answer to the tenth interrogatory he saith: A final adjustment was made with the Southern Pacific Company on the 19th of December, 1922, in which the Director General of Railroads agreed to pay and did pay to the Southern Pacific Company the sum of $9,250,000.00 in cash. This was a lump sum adjustment of the entire claim made by the Southern Pacific Company, which aggregated $54,252,694.57.

Eleventh. Was there any written contract entered into by and [fol. 102] between the Director General of Railroads and the Southern Pacific Company embodying the agreement mentioned in the Ninth and Tenth Interrogatories.

In answer to the eleventh interrogatory he saith: Yes.

Twelfth. If you answer the Eleventh Interrogatory in the affirmative, please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

In answer to the twelfth interrogatory he saith: There is herewith handed to the Commissioner a true and correct copy of the final settlement agreement made between the Director General of Railroads and the Southern Pacific Company and subsidiaries, dated December 19th, 1922, which is marked "Exhibit B."

(The paper referred to was marked "Exhibit B" and is attached to and made a part of this deposition.)

Thirteenth. If there was not any formal written agreement, please produce any letters, telegrams, or other documents or writings which may have embodied the final agreement by and between the Director General of Railroads and the Southern Pacific Company as to the amount which was to be paid for the loss of the Proteus.

In answer to the thirteenth interrogatory he saith: "Exhibit B," above referred to, is the only writing that was entered into evidencing [fol. 103] the settlement. There were no agreements of adjustment other than the one appearing in the writing above referred to.

Fourteenth. If you answer the Ninth and Tenth Interrogatories in the negative, state whether or not an item representing the amount to be paid for the loss of the Proteus appeared in any schedule of items embodied in any general settlement between the Director General of Railroads and the Southern Pacific Company?

In answer to the fourteenth interrogatory he saith: The Director General of Railroads, in concluding settlements with the respective carriers whose property was taken over by the Government and operated during the period of Federal control, made no itemized statement showing the amounts that were paid on each item in dispute, which was in anywise communicated to the Company making such settlement, but all of the settlements were what are known as lump sum, in which all items in dispute were included in the final amount offered.

It is only fair to say, however, that in making each of these settlements the Railroad Administration kept a record, which was exclusively for the use of the Railroad Administration, and was not in anywise communicated to the carriers, showing how the lump sum settlement was finally arrived at, and in the records of the Railroad Administration there appear the items showing how this lump sum was arrived at in making the adjustment with the Southern Pacific Company.

[fol. 104] The Company claimed for the loss of the Steamship Proteus $1,268,090.26, and for the loss of the Barge Confidence $16,663.80, and, in arriving at the lump sum, the Railroad Administration made an allocation and apportionment on these two items of $885,000.00.

It is perhaps only fair to state that this allocation and apportionment were made in connection with the adjustment of very many items in dispute, covering an aggregate claim in excess of $54,000,000.00, and no definite agreement as to specific items was made with the Company at the time of the final adjustment.

Fifteenth. If you answer the Fourteenth Interrogatory in the affirmative, state the amount of the item representing the amount to be paid for the loss of the Proteus.

In answer to the fifteenth interrogatory he saith: This is covered by the answer to Interrogatory 14.

Sixteenth. If you state an amount in answer to the Ninth and Tenth Interrogatories and/or in answer to the Fourteenth and Fif-

teenth Interrogatories which fixed the amount of payment to be made for the loss of the Proteus, state whether or not that amount included interest from the date of the loss, and if it did not, whether any other or further payment was made on account of interest on the said amount.

In answer to the sixteenth interrogatory he saith: There was no [fol. 105] allowance of interest made on this item.

Seventeenth. If in answer to the Ninth and Tenth Interrogatories and/or the Fourteenth and Fifteenth Interrogatories, you have stated an amount agreed to be made as a payment for the loss of the Proteus.

(a) State whether or not in arriving at that amount you took into consideration the value of the Proteus which had been fixed by the Commissioner and by the United States District Court for the Southern District of New York in this litigation?

(b) If you did not take into consideration the value of the Proteus fixed by the Commissioner and the said United States District Court in this case, will you state on what you based the amount to be paid by the Director General of Railroads to the Southern Pacific Company for the loss of the Proteus.

In answer to the seventeenth interrogatory he saith:

A. The Director General and his Staff and also Mr. Wright had knowledge of the allowance made by the United States District Court in this litigation, and that was one of the matters considered in making the adjustment, but I cannot say that it was controlling.

B. There was a very careful examination, from all available sources, made as to the actual value of the Proteus at the time of its [fol. 106] loss, and while, as heretofore stated, the finding of the court was one of the items which influenced the result the final result was obtained from all sources of information available to the Director General.

Eighteenth. Was the agreed amount to be paid for the loss of the Proteus ever paid by the Director General of Railroads to the Southern Pacific Company?

In answer to the eighteenth interrogatory he saith: The only payment made to the Southern Pacific Company was the final payment made in accordance with the agreement of final settlement, copy of which is hereto attached.

Nineteenth. If you answer the Eighteenth Interrogatory in the affirmative, will you state the date of this payment, the total amount thereof, and the person to whom it was made?

In answer to the nineteenth interrogatory he saith: The total amount of the payment was $9,250,000.00, and it was made by check issued by the Railroad Administration and payable to the Southern Pacific Company.

Twentieth. Was there any final written agreement of settlement made between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other?

In answer to the twentieth interrogatory he saith: Yes.

Twenty-first. If you answer the Twentieth Interrogatory in the affirmative, will you state when this final agreement of settlement was

[fol. 107] made and by whom it was signed on behalf of the several parties?

In answer to the twenty-first interrogatory he saith: A copy of this final settlement agreement appears in answer to Interrogatory 12, and is "Exhibit B" to this deposition.

Twenty-second. If you state there was such an agreement, will you please produce a true copy thereof and hand it to the Commissioner to be marked as an exhibit and used in this cause?

In answer to the twenty-second interrogatory he saith: A copy has heretofore been produced, and is "Exhibit B" to this deposition.

Twenty-third. If it is a fact that there was a lump sum settlement made by and between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other, will you state what the amount of that lump sum settlement was and what was allowed in such lump sum settlement on account of the loss of the steamship Proteus?

In answer to the twenty-third interrogatory he saith: As heretofore fully explained, there was a lump sum settlement, but there was no allowance on any particular items, except as heretofore stated.

Twenty-fourth. In pursuance of the final settlement, were there [fol. 108] any releases exchanged by and between the Railroad Administration and the Southern Pacific Company and its subsidiary companies?

In answer to the twenty-fourth interrogatory he saith: Yes.

Twenty-fifth. If you answer the Twenty-fourth Interrogatory in the affirmative, will you please produce and hand to the Commissioner to be marked and used as exhibits a true copy or copies of any and all such releases?

In answer to the twenty-fifth interrogatory he saith: "Exhibit B" is a full and complete copy of all releases evidencing the final settlement.

Twenty-sixth. (a) Were there any oral negotiations on the subject of the value of the Proteus?

(b) If so, where did they occur and between what persons were they held?

In answer to the twenty-sixth interrogatory he saith:

A. Yes.

B. This question has been heretofore fully answered.

Twenty-seventh. (a) During the negotiations was either the Director General of Railroads or the Southern Pacific Company represented by any lawyer?

(b) If so, what was the name of the lawyer representing the Director General of Railroads and what was the name of the lawyer representing the Southern Pacific Company?

(c) If you state that there were lawyers and give their names, will [fol. 109] you please state to what firm or firms the said lawyers belonged?

In answer to the twenty-seventh interrogatory he saith: So far as I am advised the lawyer representing the Southern Pacific Company was Mr. J. P. Blair, General Counsel of this Company, residing in New York. The lawyer representing the Railroad Administration

was Mr. Alex. W. Smith, special counsel. He was special counsel of the Railroad Administration at the time of the settlement assisting in these adjustments. He is now a resident of Atlanta, Georgia.

B. This inquiry has been heretofore answered.

C. Neither of these gentlemen at the time of making the adjustment were members of or acting as members of firms so far as I am advised. Mr. Smith was temporarily in Washington in the service of the Railroad Administration. He is a long time resident of Atlanta and a member of the firm of Smith, Hammond & Smith, but he was acting in his individual capacity in the service of the Railroad Administration.

Twenty-eighth. Did the Director General of Railroads receive any letters written by a lawyer or lawyers representing the Southern Pacific Company regarding a settlement for the loss of the Proteus?

In answer to the twenty-eighth interrogatory he saith: He did not.

Twenty-ninth. If he did, will you please produce a true copy of [fol. 110] such letter or letters and hand them to the Commissioner to be marked and used in this cause.

In answer to the twenty-ninth interrogatory he saith: There were none.

Thirtieth. If there are within your knowledge any other facts or circumstances or writing in connection with said agreement on the amount which was paid for the loss of the Proteus or the actual payment made by the Director General for the loss of the Proteus, about which you have not been specifically interrogated in the foregoing interrogatories, state fully such facts and circumstances as are within your knowledge and produce any such writings to be marked by the Commissioner and used as exhibits herein.

In answer to the thirtieth interrogatory he saith: I have no material information other than has been heretofore given.

James C. Davis.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 1st day of July, 1924, before

Wm. Parkin, Commissioner.

[fol. 111] Supreme Court of the United States, October Term, 1923

No. 607

Standard Oil Company (New Jersey)

against

Southern Pacific Company and James C. Davis, Director General of Railroads

Exhibit A to Testimony of James C. Davis

At the execution of a Commission for the examination of witnesses, wherein Standard Oil Company (New Jersey) is petitioner

and Southern Pacific Company and James C. Davis, Director General of Railroads are respondents. this paper writing was produced and shown to James C. Davis and by him deposed unto at the time of his examination and marked Exhibit A before

Wm. Parkin, Commissioner.

Agreement Between the Director General of Railroads and the Southern Pacific Company and Other Corporations, February 19, 1919

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[fol. 113] Preamble and Recitals

This agreement, made this nineteenth day of February, 1919, between Walker D. Hines, Director General of Railroads, hereinafter called the Director General, acting on behalf of the United States and the President, under the powers conferred by the proclamations of the President hereinafter referred to, party of the first part, and the Southern Pacific Company, a corporation duly organized under the laws of Kentucky; the Arizona Eastern Railroad Company, a corporation duly organized under the laws of Arizona and New Mexico; the Houston and Texas Central Railroad Company, The Galveston, Harrisburg and San Antonio Railway Company, the Texas and New Orleans Railroad Company, The Houston East and West Texas Railway Company, corporations duly organized under the laws of Texas; the Houston and Shreveport Railroad Company, Morgan's Louisiana and Texas Railroad and Steamship Company, the Louisiana Western Railroad Company, Lake Charles and Northern Railroad Company, Iberia and Vermilion Railroad Company, corporations duly organized under the laws of Louisiana, parties of the second part:

Witnesseth that—

(a) Whereas by a proclamation dated December 26, 1917, the President, acting under the powers conferred on him by the Constitution and laws of the United States, by the joint resolutions of the Senate and House of Representatives bearing date April 6 and De-

cember 7, 1917, respectively, and particularly under the powers conferred by section 1 of the act of Congress approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," took possession and assumed control at 12 o'clock noon on December 28, 1917, of certain railroads and systems of transportation, including the railroads and transportation systems of the Companies and the appurtenances thereof, and directed that the possession, control, operation, and utilization of the transportation systems thus taken should be exercised by and through William G. McAdoo, appointed Director General of Railroads; and

(b) Whereas the Congress of the United States, by an act approved March 21, 1918, hereinafter called the Federal control act, has authorized the President to enter into agreements with the companies owning the railroads and systems thus taken over for the maintenance and upkeep of the same during the period of Federal control, for the determination of the rights and obligations of the parties to the agreement arising from or out of Federal control including the compensation to be received or guaranteed, and for other purposes, as in said act more fully set out, and authorized the President to exercise any of the powers by said act or theretofore granted him with relation to Federal control through such agencies as he might determine; and

(c) Whereas by a proclamation dated March 29, 1918, the President, acting under the Federal control act and all other powers him thereto enabling, authorized the Director General either personally or through such divisions, agencies, or persons as he may appoint, and in his own name or in the name of such divisions, agencies, or persons, or in the name of the President, to agree with the carriers, or any of them, or with any other person in interest, upon the amount of compensation to be paid pursuant to law, and to sign, seal, and deliver in his own name or in the name of the President or in the name of the United States such agreements as may be necessary and expedient with the several carriers or other persons in interest respecting compensation, or any other matter concerning which it may be necessary or expedient to deal, and to make any and all contracts, agreements, or obligations necessary or expedient and to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular the acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject thereof, the President is [fol. 114] authorized to do and perform; and

(d) Whereas the said William G. McAdoo has resigned as Director General of Railroads and by a proclamation dated January 10, 1919, the President appointed Walker D. Hines Director General of Railroads and authorized him, either personally or through

such divisions, agencies or persons as he may appoint, in his own name or in the name of such divisions, agencies, or persons, or in the name of the President, to agree with the carriers or any of them or with any other person in interest, upon the amount of compensation to be paid pursuant to law, and to sign, seal and deliver in his own name or in the name of the President or in the name of the United States of America such agreements as may be necessary and expedient with the carriers or other persons in interest respecting compensation, or any other matter concerning which it may be necessary or expedient to deal, and to make any and all contracts, agreements or obligations necessary or expedient and to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of the systems of transportation taken over by the proclamation of December 26, 1917, as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties in relation to such Federal control as the President is by law empowered to do and perform; and

(e) Whereas the Interstate Commerce Commission has certified to the President the amount of the average annual railway operating incomes of the said Companies, computed in the manner provided in section 1 of the Federal control act, and the aggregate of which amounts is forty-seven million five hundred and fifty-nine thousand nine hundred and eighty-eight dollars, and ninety-one cents ($47,559,988.91), subject to such changes and corrections as the Commission may hereafter determine and certify to be requisite in order that the accounts and reports of the Companies used by the Commission as the basis of computing said average annual railway operating incomes may be brought into conformity with the accounting rules or regulations of the Commission in force at the time of such accounting, or in order to correct computations based on such accounts or reports; and

(f) Whereas the sum hereinabove mentioned in paragraph (e) includes the railroad operating income of the Southern Pacific Railroad for the line between the international boundary at Cantu and Aras Junction, Arizona, a distance of 2.7 miles, which line is not included in this contract, and the railway operating income of said line is estimated at ninety dollars and eighty-three cents ($90.83); and

(g) Whereas during the test period the Company operated a line of steamships between New York and Galveston and other ports in the Gulf of Mexico as a part of a combined rail and water system of transportation between New York, said Gulf port, and its rail terminals in Oregon and California; and whereas certain steamships and other vessels (namely, El Cid, El Dia, El Rio, El Ciglio, El Oriente, El Occidente, El Sol and Topila) belonging to the Company and used by it during the test period in connection with its system of transportation were between June 30, and December 28,

1917, requisitioned by the United States Government, except the Occidente which was taken May 30, 1917, and were on December 28, 1918, under charter to the War Department or the Navy Department; another of said ships (the Antilles) was destroyed between June 30, 1917, and December 28, 1917; another ship (El Capitan) was acquired by the Company subsequently to June 30, 1917, was not in operation during the test period, and was chartered to the War Department before December 28, 1917; and two other ships (El Almirante and Torres) were acquired after June 30, 1917, were not in operation during the test period, but were in use by the Company on December 28, 1917, and January 1, 1918, as a part of its transportation system; and whereas the aforesaid ships chartered to the War and Navy Departments were, prior to December 28, 1917, diverted to other uses and were in part employed for the transportation of troops, munitions and supplies across the Atlantic Ocean; and whereas these facts have given rise to doubts as to which, if any, of [fol. 115] the aforesaid ships under charter to the Government December 28, 1917, were taken over by the proclamation of the President referred to in paragraph (a) of this Preamble, as to whether the Director General is during Federal control entitled to the charter hire of these ships, and as to the equitable method of adjusting the annual compensation to be paid during Federal control for the Company's ships as a whole; and whereas in order to compose these doubts it has been agreed by the parties hereto that all the ships belonging to the Company on December 28, 1917, whether then under charter to the Government or not, shall be considered to have been taken over by the President and to be included in the property of which the Director General is to have (subject to the rights of the War and Navy Departments under said charter parties) the use, possession, control, and operation during Federal control, that as to the ships under charter the Director General shall during Federal control receive the charter hire, and that the Company shall during Federal control receive the sum of four hundred thousand dollars ($400,000) as annual compensation in addition to the Company's standard return.

Now, therefore, the parties hereto, of the first and second parts, respectively, each in consideration of the agreements of the other herein contained, do hereby covenant and agree to and with each other as follows:

[fol. 116] Section 1—Privity, Alterations, Definitions, etc.

Sec. 1. (a) This agreement shall be binding upon the United States, the Director General and his successors, and upon the Companies, and their respective successors and assigns.

Wherever in this agreement the word "Company" is used, it shall be understood as meaning the Southern Pacific Company; the words "Affiliated Companies" shall be understood as meaning the ten other corporations, parties to this agreement; and the word "Companies" shall be understood as meaning the eleven corporations, parties to this agreement.

The rights and obligations of the Companies in this agreement contained are several, not joint. The Company owns all the stock, except directors' qualifying shares, of all the Affiliated Companies, except as follows:

(1) Of a total outstanding issue of 270,844 shares of The Galveston, Harrisburg & San Antonio Railway Company it is the owner of record of 270,661; the owners of the remaining 183 shares being unknown and stock certificates not traceable.

(2) Of a total outstanding issue of 100,000 shares of the Houston & Texas Central Railroad Company it is the owner of record of 99,993.

(3) Of a total outstanding issue of 4,000 shares of the Houston & Shreveport Railroad Company it is the owner of record of 3,976.

This agreement shall not be construed as creating any right, claim, privilege, or benefit against any party hereto in favor of any State or any subdivision thereof, or of any individual or corporation other than the parties hereto.

(b) The provisions of this agreement may be altered, amended, or added to by and only by mutual consent signified by instruments in writing signed by the Director General and by some officer of the Company thereto duly authorized by the Board of Directors of the Company.

(c) Wherever in this agreement the word "Commission" is used it shall be understood as meaning the Interstate Commerce Commission, acting by divisions or otherwise as authorized by law; but any party shall have the right to have the decision of any division reviewed by the Commission sitting as a whole.

(d) Wherever in this agreement the words "Federal control" are used to indicate a period of time, they shall be understood as meaning the period from 12 o'clock midnight of December 31, 1917, to and including the day and hour on which said control shall cease.

(e) Wherever in this agreement the words "test period" are used, they shall be understood as meaning the period between July 1, 1914, and June 30, 1917, both inclusive.

(f) Wherever in this agreement the words "Standard return" are used, they shall be understood as meaning average annual railway operating income, computed in the manner provided in section 1 of the Federal control act, and ascertained and certified by the Commission.

(g) Wherever in this agreement the words "Director General" are used, they shall be understood as designating the person who has been or may from time to time be appointed by the President to exercise the powers conferred on him by law with relation to Federal control, or such agents or agencies as the Director General may from time to time appoint for the purpose; and wherever by this agreement any notice is to be given by the Director General, the same

may be given in his name by any subordinate thereto duly authorized.

(h) Wherever the property of any of the Companies is referred to in this agreement it shall be understood as including all the property of that Company described in paragraph (a) of section 2 hereof, whether owned by or leased to that Company, and, where the context permits, all additions or betterments thereto or extensions thereof made during Federal control; and as to all such leased property the Companies shall have the benefit of and be subject to all the obligations and provisions of this agreement and shall be subject to all duties imposed by law in respect of such leased property.

(i) The descriptive words at the heads of the several sections of this agreement and the table of contents are inserted for convenience merely, and are not to be used in the construction of the agreement.

(j) "Railway," "railway property," "railway operation," "railway revenue and expenses," wherever used in this agreement shall, unless from the context a contrary intent plainly appears, be deemed to include the water lines or water craft of any of the Companies whose system of transportation includes water lines or water craft.

[fol. 117] Section 2—Property Taken Over

Sec. 2. The railroads and systems of transportation of the Company and of its said Affiliated Companies of which the President has taken over possession, use, control, and operation shall be considered as including:

(a) The following roads and properties:

1. The combined rail and water system of transportation of the Southern Pacific Company, consisting of railroads, steamships and other water craft, viz: the lines of railroad owned or leased, and operated, by the Southern Pacific Company, extending from Portland, Oregon, and Ogden, Utah, to San Francisco and Los Angeles, California, Yuma and Nogales, Arizona, Deming, New Mexico, and the New Mexico-Texas State line, traversing the States of Oregon, Utah, Nevada, California, Arizona and New Mexico, with branch lines to various points in said States, but not including two and seven-tenths miles of line between the international boundary at Cantu and Araz Junction, Arizona; also the passenger ferry steamers Alameda, Berkeley, El Capitan, Melrose, Oakland, Piedmont, Santa Clara, Thoroughfare, Bay City, Encinal, Garden City, and Newark, connecting San Francisco, California, with the above described lines of railroad at Oakland and Alameda, California; the river steamers, Apache, Cherokee, Iroquois, Modoc, Navajo, and steam barge Fruto, operating between San Francisco and Sacramento, California; the car transfer steamers Solano and Contra Costa; the tugs Ajax, Rival and Flyer; and all cars floats, dredges, pile drivers, launches and scows operated in connection with the system of transportation hereinbefore described.

Also the ocean steamships owned and operated by the Southern Pacific Company under the name of Southern Pacific Co.—Atlantic Steamship Lines—Morgan Line, and under the name of Southern Pacific Co.—Atlantic Steamship Lines—Havana Line, described as follows:

Passenger and freight steamers, Chalmette, Comus, Creole, Excelsior, Momus, Proteus; freight steamers, El Alba, El Almirante, El Capitan, El Cid, El Dia, El Mar, El Monte, El Mundo, El Norte, El Occidente, El Oriente, El Paso, El Rio, El Siglo, El Sol, El Sud, El Valle; oil tank steamers Topila and Torres; tugs El Amigo, El Chico, El Rey; steam barges Manhattan and Despatch; and sixty barges operated in connection therewith, including all rights in and to the use of wharves, docks, and water front terminals used in connection with the operations of said fleet at New York, New York, Galveston, Texas, New Orleans, La., and Havana, Cuba; and all other equipment and appurtenances commonly used upon or operated as a part of the Company's system of water transportation between the port of New York, and the port of Galveston, between the port of New York and the port of New Orleans, and between the port of New Orleans and the port of Havana, Cuba.

2. The railroad of the Arizona Eastern Railroad Company, including the railroad of the Phœnix & Eastern Railroad Company, which is under lease to the Arizona Eastern Railroad Company, extending from Phœnix, Arizona, to Hassayampa, to Maricopa, to Winkleman; from Bowie to Live Oak; and from Cochise to Kelton and Gleason—all in the State of Arizona—with branch lines extending to various points in said State.

3. The railroad of the Houston and Texas Central Railroad Company, extending from Houston, Texas, to Denison, Fort Worth, Ross, Lampasas, Llano, Flatonia, and Stella, all in the State of Texas, with branch lines to various points in said State.

4. The railroad of The Galveston, Harrisburg & San Antonio Railway Company, extending from Galveston and Houston, Texas, to the New Mexico-Texas State line, to Eagle Pass, Beeville, Port [fol. 118] Lavaca, Lagrange, Matagorda Bay, and Hawkinsville, all in the State of Texas, with branch lines to various points in said State.

5. The railroad of the Texas and New Orleans Railroad Company, extending from Houston, Texas, to Echo, to Sabine Pass, and to Dallas, all in the State of Texas, with branch lines extending to various points in said State.

6. The railroad of The Houston, East and West Texas Railway Company, extending from Houston in the State of Texas to Logansport in the State of Louisiana.

7. The railroad of the Houston and Shreveport Railroad Company, extending from Logansport in the State of Louisiana to Shreveport in the same State.

8. The railroad of Morgan's Louisiana and Texas Railroad and Steamship Company, extending from New Orleans, Louisiana, to Lafayette, to Alexandria, to Baton Rouge, all in the State of Louisiana, with branch lines to various points in said State. Also the tugs El Listo, El Vivo, Juno and Restless, car transfer barges Mammoth and Mastoden, together with auxiliary floating equipment.

9. The railroad of the Louisiana Western Railroad Company, extending from Lafayette, Louisiana, to Mamou, to Abbeville, to Lake Arthur, and to the Sabine River, all in the State of Louisiana, with branch lines extending to various points in said State.

10. The railroad of the Lake Charles and Northern Railroad Company, extending from Lakes Charles, Louisiana, to De Ridder and Nitram in the same State.

11. The railroad of the Iberia and Vermilion Railroad Company, extending from Iberia and Vermilion Junction, Louisiana, to Salt Mine, and to Abbeville, in the same State, with branch lines to various points in said State.

together with all branches and tracks, trackage, bridge, and terminal rights, and lines of railroad owned by or leased to and operated by any of the Companies as a part of their systems of transportation, and all other property of the Companies, with the appurtenances thereof, whether included in the foregoing list or not, the revenues of which were used, or which, if the property had been then owned by or leased to any of the Companies and had then been revenue bearing, would have been used, in computing its standard return.

Each of the Companies reserves to itself the benefit of all leases (and of all rents and revenues accruing therefrom) of parts of its right of way, station grounds, and other property, the revenues from which under the accounting rules of the Commission in force during the test period were properly creditable to "miscellaneous rent income" or "miscellaneous income." Each of the Companies grants to the Director General all its rights to terminate leases of any part of its right of way, yards, or station grounds, and to occupy and use the premises of any such lessee when, in his judgment, the same is required for operating purposes. Each of the Companies shall have for its own benefit the right to lease for industrial sites or other purposes such portion of its right of way, yards, or station grounds, or structures thereon as are not required by the Director General for operating purposes, and to receive and enjoy the rentals therefrom, subject to the right of the Director General to cancel any such lease and to occupy the premises or structures whenever, in his judgment, the same are necessary for operating purposes. All expenses connected with any such property heretofore or hereafter leased or otherwise occupied as in this paragraph provided, including taxes thereon which during the test period were not charged to railway tax accruals, shall be paid by the Companies while receiving the revenues therefrom.

The Director General shall have the right during Federal control to use and occupy for his purposes so much of the Company's office

building in San Francisco, California, located in the block bounded by Market, Stewart, Mission and Spear Streets, and of the two buildings of the Company in the same block (known as the Buckley Building or Annex A, and the Brandenstein Building or Annex B) as in his opinion is required. He shall pay to the Company for [fol. 119] the portion of the buildings so occupied a rental the amount of which shall be determined as follows: The annual rental value of the entire buildings shall be taken to be the sum of the following factors: Five per cent for interest on the cost of land and buildings as of December 31, 1917; two per cent for depreciation on the cost of the buildings as of said date; expenses of operation, including maintenance and insurance; and taxes. The total square feet of space in the buildings available for business purposes shall be ascertained. The rate per square foot shall be derived by dividing the annual rental value of the entire buildings by total square feet of space available for business purposes. The product of the rate per square foot by the square feet of space occupied as aforesaid by the Director General shall constitute the annual rental to be paid to the company (in addition to the compensation provided in section 7 hereof) which shall, out of its own funds, pay all expenses of operation, including maintenance and insurance, and taxes, and shall have the right to occupy for its corporate purposes or lease to others the portions of the buildings not occupied by the Director General. The annual rent so determined shall be payable monthly. This provision shall be retroactive to January 1, 1918, and the accounts of the parties shall be adjusted in conformity herewith; and the amounts, if any, upon such adjustment found due to the Company for the use of said buildings from January 1, 1918, to the date of the execution of this agreement shall be due and payable on the execution hereof. Provided, however, that for the space in said buildings occupied by the Director General on December 1, 1918, estimated at two hundred and eight thousand, two hundred and nine (208,209) square feet, the total annual rent to be paid by him under the foregoing provisions shall not exceed the sum of one dollar and fourteen cents ($1.14) per square foot.

(b) All materials and supplies on hand at midnight December 31, 1917.

(c) All balances in the account or accounts representing the total of "Net balance receivable from agents and conductors" as of midnight December 31, 1917;

[fol. 120] Section 3—Acceptance

Sec. 3. (a) The Companies accept all the terms and conditions of the Federal control act and any regulation or order made by or through the President under authority of said act or of that portion of the act approved August 29, 1916, referred to in paragraph (a) of the preamble to this agreement which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation; and they further and expressly

accept the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights, at law or in equity, which they or any of them now have or hereafter can have, otherwise than under this agreement, against the United States, the President, the Director General, or any agent or agency thereof, for compensation under the Constitution and laws of the United States for the taking possession of their property, and for the use, control, and operation thereof during Federal control, and for any and all loss and damage to their business or traffic by reason of the diversion thereof or otherwise which has been or may be caused by said taking or by said possession, use, control, and operation.

No claim is made by the Companies for compensation for the period between noon of December 28 and midnight of December 31, 1917; and the revenues of said period shall belong to the Companies, and the expenses thereof shall be paid by them, allocated in both cases as provided in paragraph (b) of section 4 hereof.

(b) The Companies, on their own initiative or upon the request of the Director General, shall take all appropriate and necessary corporate action to carry out the obligations assumed by them in this agreement or lawfully imposed upon them by or pursuant to the proclamation of December 26, 1917, or by the Federal control act.

(c) The Federal control act being in section 16 thereof expressly declared to be emergency legislation enacted to meet conditions growing out of war, nothing in this agreement shall be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of the Companies, or the method or basis of the capitalization thereof, and the recitals or provisions of this agreement shall not be used as evidence or otherwise, by or against any party hereto in any pending or future proceeding which involves the acquisition or valuation of the property of any of the Companies or any part thereof; but nothing in this paragraph shall be taken or construed as affecting the settlement and discharge contained in paragraph (a) of this section, nor as limiting or qualifying any of the provisions of said paragraph for the purposes thereof, nor as limiting the use of this agreement as evidence in any proceeding under this agreement or under the Federal control act.

[fol. 121] Section 4—Operation and Accounting During Federal Control

Sec. 4. (a) All amounts received by the Director General under paragraph (c) of section 2 hereof and all other amounts whether received from the Companies in cash or collected or realized upon by him from current operating assets belonging to the Companies or arising from railway operations prior to midnight of December 31, 1917, shall be credited by him to the Companies; and the Director General shall, to the extent of the cash so received or realized, pay

and charge to the Companies all expenses arising out of railway operations prior to January 1, 1918, including reparation claims, and unless objected to by the Company, may pay and charge to the Companies any of such expenses, including reparation claims, in excess of the cash so received or realized. Balances of the above accounts shall be struck quarterly on the last days of March, June, September, and December of each year, and the cash balance found on such adjustments to be due either party shall be then payable and, if not paid, shall bear interest at the rate of 6 per cent per annum, unless the parties shall agree upon a different rate; except that the rate of interest on any portion of a balance found due to the Companies which is derived from cash in bank to the credit of the Companies on interest, shall be adjusted in each case independently of this contract as the parties may agree.

(b) Railway operating expenses, reparation and other claims, hire of equipment and joint facility rents shall be allocated with reference to the time when incurred as between the period prior and subsequent to midnight of December 31, 1917, and as between the period of Federal control and the period subsequent thereto. Railway operating revenues shall be allocated as between the period prior and subsequent to midnight of December 31, 1917, in accordance with the established accrual practices of the Companies; except that where prior to midnight of December 31, 1917, the Company's part of a service on through business had been completed or carload lots on their own lines had reached destination, the revenue of the Companies for such service shall be allocated to them; but as to classes of traffic where in the opinion of the Director General such allocation will involve undue delay or undue absorption of accounting labor, such revenues shall be allocated in accordance with the established accrual practices of the Companies. Like methods of accruing and allocating such revenues shall be made at the end of Federal control.

(c) All expenditures made by the Director General during Federal control for additions and betterments, exclusive of equipment, or for extensions begun prior to January 1, 1918, shall be charged to the Companies, and if the completion of any such addition, betterment, or extension is approved or ordered by the Director General, the Companies shall be entitled under the provisions of paragraph (d) of section 7 hereof to interest on the cost thereof from the completion of the work; but no interest (except to the extent that the same may be allowed and included in the compensation provided for in paragraph (a) of section 7 hereof) shall be due the Company upon any such expenditures for work done prior to January 1, 1918. Payments for all equipment ordered or under construction by the Companies prior to January 1, 1918, but delivered on or after that date, shall also be considered as expenditures made by order or approval of the Director General under paragraph (d) of section 7 hereof. Interest during construction payable under this paragraph, and also interest during construction on the cost of any additions, betterments, and road extensions made by the Companies or at their

expense to the Companies' property during Federal control, shall be included in the cost of the work.

(d) Cash receipts or disbursements and other items arising out of transactions which do not enter into or form a part of those used in determining the Companies' standard return shall not be received or paid by the Director General unless such transactions are negotiated or conducted by his order for account of the Companies and with the consent of the Company. When moneys are so received or paid by the Director General in connection with such corporate transactions they shall be credited or charged to the Companies. There shall be an accounting of the amounts due by or to any of the parties under this paragraph at the end of each quarter year of Federal control, and the amount so found due shall be then payable and if not paid shall bear interest as provided in paragraph (a) of this [fol. 122] section.

(e) All sums paid by the Director General to maintain pension funds or pension obligations or practices, and all contributions to Young Men's Christian Associations or employees, employees' savings funds, relief funds or associations, reading rooms, or health, accident, or death benefits for employees, shall be treated as a part of railway operating expenses during Federal control.

The Company shall continue during Federal control in substantially the same way as it did during the test period to operate and maintain its general hospital at San Francisco, the Huntington Social Hall at San Francisco, the Crocker Memorial Hospital at Sacramento, and the emergency hospitals located at various points along its lines of railroad described in paragraph (a) of section 2 hereof, and to make arrangements at other points on said lines, when necessary, for the care and treatment of the employees on said properties. The Company, through its Chief Surgeon, shall continue to render such surgical and medical services as were rendered prior to Federal control, including services incident to personal injuries, the physical examinations of employees, and supervision of sanitary conditions; but the beneficiaries of the hospital system and services shall be only the officers and employees of the Company and the officers and employees of the Director General on the properties of the Company described in paragraph (a) of section 2 hereof.

The Director General shall during Federal control provide for the continuance of the contributions of fifty cents per month to be made by all officers and employees, the same to be collected by deduction from the pay-rolls, as heretofore, and paid over as collected to the Company. He shall continue to charge to operating expenses and pay to the said Company the sum of six hundred and forty-five dollars each month in return for the services hereinabove provided for incident to personal injuries and the physical examination of employees. He shall also continue to charge to operating expenses the expenses actually incurred in the maintenance of the emergency hospitals located at various points along the lines of the Company of the class heretofore charged to operating expenses of the railroads; and shall

continue to give free transportation as heretofore to the surgeons and physicians of the Company.

The Company shall continue to receive and expend as heretofore the interest on the Harriman Laboratory Fund now in the hands of the Union Trust Company of San Francisco. The Company accepts the contributions and monthly sum herein agreed to be paid to it in full compensation for the use of its hospital buildings and equipment and for the continued operation of the same as heretofore and for the rendition of the other surgical or medical services hereinabove described.

Until the Director General otherwise directs, the arrangement between The Galveston, Harrisburg and San Antonio Railway Company and the Hospital Association of the Sunset-Central Lines, composed of employees of the nine railroad companies of Texas and Louisiana, parties to this agreement, for the rent of said company's hospital building and its appurtenances at Houston, Texas, shall continue in force, the compensation or rental to said company to be the same as for the year ended December 31, 1917, namely, $16,552.80 per annum. Should the Director General terminate the operation of said hospital by the said Hospital Association, he shall have the right during Federal control to rent from said company the said hospital and its appurtenances at the annual compensation or rental as aforesaid of $16,552.80, payable monthly. The said company consents that the Hospital Association may extend its membership so as to include employees of other lines in the benefits of the hospital, such extension of membership, however, not to exceed the present capacity of the hospital.

[fol. 123] (f) All salaries and expenditures incurred by the Companies during Federal control for purposes which relate to the existence and maintenance of the corporations, or to the properties of the Companies not taken over by the President, or to negotiations, contracts, valuations, or any business controversy with the Government or any branch thereof, and which are not specially authorized by the Director General, shall be borne by the Companies; except that the expenses of valuation now being made by the Commission to the extent that they are, in the opinion of the Director General, necessary to comply with the valuation orders and other requirements of the Commission and to the cooperation of the Companies in the making of such valuation, shall be paid by the Director General as a part of railway operating expenses. If the Company is dissatisfied with the ruling of the Director General it may appeal to the Commission, whose decision shall be final.

(g) The Director General shall furnish for additions, betterments and road extensions to the Companies' property approved or ordered by him any of the materials and supplies taken over under paragraph (b) of section 2 hereof, or purchased by him and held for use in connection with the Companies' property, in so far as, in his judgment, he can do so with due regard to his own requirements. Materials and supplies so furnished shall be charged to the Companies at cost.

(h) The Director General shall at his option be substituted for the period of Federal control in the place of the Companies in respect of the benefits and obligations of contracts relating to operation in force January 1, 1918 (including contracts made by subsidiaries for the use and benefit of the Companies and the right to abrogate or change and make new contracts with express companies for the period of Federal control), except as to contracts between the Companies and subsidiary companies which shall be considered and treated as arrangements or practices; and the Director General shall in like manner at his option be substituted for such period in respect of the benefits and obligations of arrangements and practices in force during the test period in regard to fuel, materials, and supplies for the operation of the property described in paragraph (a) of section 2 hereof and of any additions, betterments, and road extensions thereto, obtained from any mine, oil field, or other source of supply owned or controlled by the Companies, it being understood that under such arrangements or practices, if availed of by the Director General, he shall, to the extent necessary to offset any increase in the standard return growing out of the furnishing by the Companies or their subsidiaries, during the test period of fuel, materials, and supplies under an arrangement or practice at less than the then cost or the then market value thereof for railroad purposes, be charged for such fuel, materials, and supplies a price expressed in dollars or cents per unit below or above the then cost or the then market value thereof for railroad purposes (as the practice of the Companies may have been) in the same amount that the prices charged the Companies during the test period were below or above the then cost or the then market value thereof for railroad purposes; and at the request of the Director General or the Companies the prices for fuel or materials supplied between December 31, 1917, and the execution of this contract shall be adjusted on the foregoing basis: Provided, however, That a source of supply which the Companies had acquired to safeguard their own operations shall not be depleted or reduced for use on other transportation systems, except in cases of emergency to be determined by the Director General, in which event the quantity so used on other transportation systems shall be accounted for to the Companies at the fair value thereof: And provided further, That materials and supplies secured under contracts which the Companies had made for their own operations shall, so far as practicable, be used on the Companies' property, and that, if used on any other transportation system, materials and supplies of like character shall be furnished by the Director General for use in making such additions, betterments, and road extensions as shall be chargeable to the Companies, and shall be charged at cost under such contracts.

(i) The Director General shall pay, or save the Companies harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during Federal con- [fol. 124] trol, except the expenses which under this agreement are to be borne by the Companies. He shall also pay or save the Companies harmless from all rents called in the monthly reports to the Commission equipment rents or joint-facility rents, and all judg-

ments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon, the Companies by reason of any cause of action arising out of Federal control, or of anything done or omitted in the possession, operation, use, or control of the Companies' property during Federal control, except judgments or decrees founded on obligations of the Companies to the Director General or the United States.

(j) Except as otherwise provided in this agreement, the Director General shall save the Companies harmless from any and all liability, loss, or expense resulting from or incident to any claim made against the Companies growing out of anything done or omitted during Federal control in connection with, or incident to, operation or existing contracts relating to operation, and shall do and perform, so far as is requisite under Federal control for the protection of the Companies, all and singular the things, of which he may have notice, necessary and appropriate to prevent, because of Federal control or of anything done or omitted thereunder, the forfeiture or loss by the Companies of any of their property rights, ordinance rights or franchises, or of their trackage, lease, terminal, or other contracts involving a facility of operation; but nothing herein contained shall be construed to require the Director General to make any capital expenditure necessary to preserve a franchise or ordinance right not heretofore availed of by the Companies. The Director General shall also save the Companies harmless from any and all claims for breach of covenant heretofore entered by the Companies or by any predecessor in title or interest in any mortgage or other instrument in respect to insurance against losses by fire.

Nothing in this or in the preceding paragraph shall be construed to be an assumption by the Director General of, or to make him liable on, any obligation of the Companies to pay a debt secured by a mortgage or any rent under a lease, except rents which during the test period were called in the monthly reports to the Commission equipment rents and joint facility rents and rents which under the accounting rules of the Commission in force during the test period were classified as operating expenses; or to make the Director General liable to the Companies in respect of any interest on any bonds issued by, or in respect of any obligations of, other corporations, or in respect of contributions to make up deficits in the earnings of other corporations, except as payments in respect of such interest or other amounts were classified under said rules as equipment or joint facility rents, or were a class of payments to be otherwise reflected in railway operating income.

The Companies shall, during Federal control, pay the rents of any property, held by them under lease or contract, described in paragraph (a) of section 2 hereof, except the rents which during the test period, were under the rules of the Commission, classified as equipment rents or joint facility rents, and rents which were classified as operating expenses; which excepted rents shall be paid by the Director General. If the lease of, or right to use, any property described in paragraph (a) of said section 2 expires during Federal control, the Companies shall, if possible, and if requested by the Director General, renew the same; the rental, however, of property in the ex-

cepted classes above mentioned shall be paid by the Director General. The Companies shall pay the same amount of rent as was payable at the beginning of Federal control for other property, the lease of or right to use which is renewed at the request of the Director General, but any increases in the rental of such other property shall be paid by the Director General.

(k) In carrying out the provisions of paragraphs (a), (b), (c), and (d) of this section and the provisions of section 6 hereof the Director General shall not settle any claim by or against the Companies against the objection in writing of the president or of any other duly authorized officer of the Companies. The conduct of all litigation before any court or commission arising out of such disputed claims, or out of operation prior to Federal control, shall be in charge of the Director General's legal force and the expense [fol. 125] thereof shall be paid by the Director General; but the Companies may, at their own expense, employ special counsel in connection with any such litigation.

(l) Nothing in this agreement shall be construed as inconsistent with the provision in section 10 of the Federal control act that no process, mesne or final, shall be levied against any property under Federal control, nor as a waiver by the United States of any claim that might otherwise be made by it that the rights of any State or subdivision thereof or of any individual or corporation have been abrogated or suspended by the taking over of the Companies' property or by Federal control.

(m) The Companies shall have the right at all reasonable times to inspect the books and accounts kept by the Director General relating to their property or to the operation thereof, and the Director General shall during Federal control furnish the Companies with copies of the operating reports relating to their property, and as soon as practicable after the end of each fiscal year shall furnish to the Companies a complete list of their equipment as of the end of such fiscal year.

[fol. 126] Section 5—Upkeep

Sec. 5. (a) During the period of Federal control the Director General shall, annually, as nearly as practicable, expend and charge to railway operating expenses, either in payments for labor and material or by payments into funds, such sums for the maintenance, repair, renewal, retirement, and depreciation of the property described in paragraph (a) of section 2 hereof as may be requisite in order that such property may be returned to the Companies at the end of Federal control in substantially as good repair and in substantially as complete equipment as it was on January 1, 1918: Provided, however, That the annual expenditure and charges for such purposes during the period of Federal control on such property and the fair distribution thereof over the same, or the payment into funds of an amount equal in the aggregate (subject to the adjustments provided in paragraph (c) and to the provisions of paragraph (e) of this section) to the average annual expenditure and charges for such purposes in-

cluded under the accounting rules of the Commission in railway operating expenses during the test period, less the cost of fire and marine insurance included therein, shall be taken as a full compliance with the foregoing covenant.

(b) The Director General may expend such sums, if any, in addition to those expended and charged under paragraph (a) of this section (subject to the adjustments provided in paragraph (c) of this section) as may be requisite for the safe operation of the property described in paragraph (a) of section 2 hereof, assuming a use similar to the use during the test period and not substantially enhancing the cost of maintenance over the normal standard of maintenance of railroads of like character and business during said period; and the amount, if any, of such excess expenditures during Federal control shall be made good by the Companies as provided in paragraph (b) of section 7 hereof.

(c) In comparing the amounts expended and charged under the provisions of paragraphs (a) and (b) of this section with the amounts expended and charged during the test period, due allowance shall be made for any difference that may exist between the cost of labor and materials and between the amount of property taken over and the average for the test period, and, as to paragraph (a), for any difference in use between that of the test period and during Federal control which in the opinion of the Commission is substantial enough to be considered, so that the result shall be, as nearly as practicable, the same relative amount, character, and durability of physical reparation.

(d) At the request of the Director General or the Company there shall be an accounting of the amounts due by or to any of the parties under paragraphs (a) and (b) of this section at the end of each year of Federal control and at the end of Federal control.

(e) If during Federal control any of the property, other than floating equipment, described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged otherwise than by fire or public enemies, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss; and the cost of restoration or replacement, or said value or damage, as the case may be, shall be charged to annual railway operating expenses; it being understood that extraordinary losses caused by floods, explosions, train wrecks or accident are included in the matters covered by this paragraph, while ordinary losses due to such causes are included in the matters covered by paragraph (a) of this section: Provided, however, That if the Commission on application of the Director General or the Company and after giving due consideration to the practice of the Companies during the test period in respect to such matters and to any other pertinent facts and circumstances, determines that it is just and reasonable that the said cost or value shall

be apportioned or extended over a period of more than one year, this shall be done, and so much of said cost or value as may be apportioned by the Commission over the period subsequent to Federal control, shall be charged to the Companies in the final accounting at the end of Federal control and shall be paid by them.

[fol. 127] If, during Federal control, any of the property described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged by fire or marine casualty, or any of the floating equipment described in paragraph (a) of section 2 hereof is destroyed or damaged by war risks while in ocean waters outside of the three-mile limit, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss; and the cost of restoration or replacement or said value or damage, as the case may be, shall be charged to annual railway operating expenses, but the same shall not be considered a charge to such expenses for the purposes specified in paragraph (a) of this section.

In case of any such loss or damage by fire, or marine casualty, the Director General shall, if given written notice of the requirements of any mortgages, equipment lease, or trust on the property so destroyed or damaged, make such restoration or replacement, or pay such value or damage, in such way as to meet the requirements of such mortgage, equipment lease, or trust in the same manner as would have been proper in applying the proceeds of insurance on such property if it had been insured by the Companies against loss or damage in accordance with the terms of such instruments of lien; and a compliance with the written request of the Company in respect thereof shall be a full acquittance of any obligation of the Director General in the premises.

The words "marine casualty" are used herein as applying to floating equipment and as meaning casualties covered by the usual marine insurance policy, including collision clause, and losses or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosion, bursting of boilers or breakage of shafts or through carrying explosives.

The foregoing parts of this paragraph are subject to the proviso that in case of loss or damage any additions and betterments made in connection with or as a part of the restoration or replacement of property damaged or destroyed and chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, shall be charged to and paid by the Companies.

The Director General shall not be liable to the Companies for any loss or damage due to the acts of public enemies, except as provided in this paragraph (c) as to floating equipment.

(f) If any additions, betterments, or road extensions are made to the property taken over or any equipment is added at the expense of the Companies and with the approval or by order of the Director General during Federal control, he shall expend and charge

to railway operating expenses such sums either in payments for labor and materials or by payments into funds, as may be requisite for the proper maintenance, repair, renewal, retirement, and depreciation of such property until the end of Federal control.

(g) The Companies shall have the right to inspect their property at all reasonable times during Federal control, and the Director General shall provide reasonable facilities for such inspection.

(h) If any question shall arise, either during or at the end of Federal control, as to whether the covenants or provisions in this section contained are being or have been observed, the matter in dispute shall, on the application of the Director General or the Company, be referred to the Commission which, after hearing, shall make such findings and order as justice and right may require, which shall be final as to the questions submitted and shall be binding on and observed by the parties hereto, except that the Director General or the Company may take any question of law to the courts, if he or it so desires.

Some of the steamships enumerated in paragraph (a) of Section 2 hereof, having been on January 1, 1918, under charter to different departments of the United States Government the Company hereby subrogates the Director General to all its rights and obligations under any and all such charter-parties, all charter hire, however, accruing under any of the same for the period prior to January 1, 1918, to be paid to the Company; and the Director General shall enforce the rights of the Company including the right, if any, to have such steamships returned by the charterer in as good order and condition as when received.

[fol. 128] Section 6—Taxes

Sec. 6. (a) All taxes assessed under Federal or any other governmental authority for the period prior to January 1, 1918, including a proportionate part of any such tax assessed after December 31, 1917, for a period which includes any part of 1917 or preceding years and unpaid on that date, all taxes commonly called war taxes which have been or may be assessed against the Companies under the act of Congress entitled "An act to provide revenue to defray war expenses, and for other purposes," approved October 3, 1917, or under any act in addition thereto or in amendment thereof, and all taxes which have been or may be assessed on property under construction, and all assessments which have been or may be made for public improvements, chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, shall be paid by the Companies; but upon the amount thus chargeable to investment interest shall be paid to the Company during Federal control at the rate provided in paragraph (d) of section 7 hereof. Taxes assessed during construction on additions, betterments, and road extensions made by the Companies with the approval or by order of the Director General during Federal control shall be considered a part of the cost of such addi-

tions, betterments, and extensions, and shall, under the provisions of paragraph (d) of section 7 hereof, bear interest as a part of such cost from the date of the completion of such additions, betterments, or extensions. Assessments for public improvements which do not become a part of the property taken over shall bear interest from the date of the payment of such assessment.

(b) If any tax or assessment which under this agreement is to be paid by the Companies is not paid by them when due, the same may be paid by the Director General and deducted from the next installment of compensation due under section 7 hereof. If any taxes properly chargeable to the Director General have been or shall be paid by the Companies, they shall be duly reimbursed therefor.

(c) The Director General shall either pay out of revenues derived from railway operation during the period of Federal control or shall save the Companies harmless from all taxes lawfully assessed under Federal or any other governmental authority for any part of said period on the property under such control, or on the right to operate as a carrier, or on the revenues derived from operation, and all other taxes which under the accounting rules of the Commission in force December 31, 1917, are properly chargeable to "railway tax accruals," except the taxes and assessments for which provision is made in paragraph (a) of this section. The Director General shall pay or save the companies harmless from the expense of all suits respecting the classes of taxes payable by him under this agreement.

(d) If any such tax is for a period which began before January 1, 1918, or continues beyond the period of Federal control, such portion of such tax as may be apportionable to the period of Federal control shall be paid by the Director General, and the remainder shall be paid by the Companies.

(e) Whenever a period for which a tax is assessed cannot be definitely determined, so much of such tax as is payable in any calendar year shall be treated as assessed for such year.

[fol. 129] Section 7—Compensation

Sec. 7. (a) The annual compensation guaranteed to the Companies under section 1 of the Federal control act shall be the net aggregate of the Companies' standard return and of the special compensation set forth in paragraphs (e), (f) and (g) of the preamble of this agreement, namely, the sum of forty-seven million nine hundred and fifty-nine thousand eight hundred and ninety-eight dollars and eight cents ($47,959,898.08) during each year and pro rata for each fractional part of a year of Federal control, subject, however, to any increase or decrease in the standard return hereafter made by the Commission as provided in paragraph (e) of the preamble of this agreement.

Compensation paid by the Director General under this agreement, including that provided for in paragraph (d) of this section, or

arising from any other source, shall be paid to the Company; and the Company, after retaining such part thereof as it may be entitled to retain shall distribute the remainder to the parties entitled thereto.

(b) The said compensation shall be paid to the Company quarterly in equal installments on the last days of March, June, September, and December of each year for the quarter ending therewith, except that the first four installments shall be due as of March 31, 1918, June 30, 1918, September 30, 1918, and December 31, 1918, respectively, but shall be paid upon the execution of this agreement; but from each installment there may be deducted any amount then due by the Companies under paragraphs (a) and (d) of section 4 hereof, under paragraph (b) of section 5 hereof, and under paragraph (b) of section 6 hereof, and all amounts required to reimburse the United States for the cost of additions and betterments made to the property of the Companies not justly chargeable to the United States, unless such matters are financed or otherwise taken care of by the Companies to the satisfaction of the Director General, and the Director General may apportion any such amounts to two or more subsequent installments: Provided, however, That said power to deduct amounts due or accruing under paragraph (b) of section 5 hereof and the cost of additions and betterments not justly chargeable to the United States shall not be so exercised as to prevent the Companies from paying out the sums reasonably required to support their corporate organizations, to keep up sinking funds for the Companies' debts required by contracts in force December 31, 1917, to pay their taxes, to pay rents and other amounts (not chargeable to capital account) properly payable by the Companies for leased or operated roads and properties, to pay interest which has heretofore been regularly paid by the Companies, and interest on loans issued during Federal control and approved by the Director General, nor shall such deduction be made in respect of additions and betterments which are for war purposes and not for the normal development of the Companies, nor in respect of road extensions, nor in respect of amounts due under paragraphs (a) and (d) of section 4 hereof, in cases where the current assets, including materials and supplies, of the Companies taken over by the Director General under the provisions of this agreement clearly exceed the current liabilities of the Companies paid or assumed by the Director General under said section. In the event of a difference as to the fact whether additions and betterments are for war purposes and not for the normal development of the Companies, or as to whether an addition is a road extension, the question may, on application of the Director General or the Company, be referred to and determined by the Commission.

The power provided in this paragraph to deduct the amount due by the Companies for the cost of additions and betterments not justly chargeable to the United States is further declared to be an emergency power, to be used by the Director General only when he finds that no other reasonable means is provided by the Companies to reimburse the United States, and, as contemplated by the President's

proclamation and by the Federal control act, it will be the policy of the Director General to so use such power of deduction as not to interrupt unnecessarily the regular payment of dividends as made by the Companies during the test period.
[fol. 130] Overdue installments of compensation, or balances thereof, provided for in this section shall bear interest from maturity at the rate of five per cent per annum, except that if the Director General shall, prior to the execution of this contract, have loaned the Companies any money, then, to the extent of the amount thus loaned, the installments of compensation overdue at the date of the execution hereof shall bear interest from maturity at the same rate as that charged to the Companies on such loans.

(c) During Federal control the Companies shall not, without the prior approval of the Director General, issue any bonds, notes, equipment trust certificates, stock, or other securities, or enter into any contracts (except contracts in respect of corporate affairs and property not taken under Federal control), or agree to pay interest on their debts at a higher rate, or for rent of leased roads and properties a larger amount, than the rates and amounts payable as of, or required by contracts in force on, December 31, 1917. The Companies may, however, procure the authentication and delivery to them under any mortgage or trust deed or agreement in force December 31, 1917, of bonds or notes issuable thereunder in respect of additions, betterments, extensions, and equipment, or for refunding purposes.

(d) Upon the cost of additions and betterments, less retirements in connection therewith, and upon the cost of road extensions, made to the property of the Companies during Federal control, the Director General shall, from the completion of the work, pay the Company a reasonable rate of interest, to be fixed by him on each occasion. In fixing such rate or rates he may take into account not merely the value of money but all pertinent facts and circumstances, whether the money used was derived from loans or otherwise, provided that to the extent that the money is advanced by the Director General or is obtained by the Companies from loans or from the proceeds of securities the rate or rates shall be the same as that charged by the Director General for loans to the Companies or to other companies of similar credit.

(e) From the compensation so received or from other income, if adequate for the purpose, the Companies shall make all payments of interest, rents (other than the equipment rents, joint facility rents, and rents classified as operating expenses mentioned in paragraph (i) of section 4 hereof), and other sums necessary to prevent a default under any mortgage or lease of any of the property described in paragraph (a) of section 2 hereof; and if at any time during Federal control the Companies, by virtue of any change in the right of possession (subject to the rights of the United States) to any of said property or otherwise, shall no longer be entitled as

between themselves and any other person or corporation, not a party to this agreement, to receive the entire compensation herein provided, such compensation shall be apportioned and paid as between those entitled thereto, as justice and right may require.

[fol. 131] Section 8—Claims for Losses on Additions, etc.

Sec. 8. (a) Prompt notice in writing, except as provided in paragraph (d) of this section, shall be given the Companies of the making or ordering of any additions, betterments, or road extensions, including terminals, motive power, cars, or other equipment to or for the property of the Companies costing more than one thousand dollars, with an estimate of the cost thereof. Such notice shall be given before the beginning of the work or the acquisition of the property whenever in the judgment of the Director General it is practicable to do so. Within a reasonable time after the completion of the work or the acquisition of the property, a written statement of the final cost thereof shall be given the Companies. There shall be furnished the Companies, as soon as practicable after the end of each month, a written statement of all expenditures estimated to cost one thousand dollars or less chargeable to investment in road and equipment made during the month, with a brief description of the work done or of the property acquired; and such statement shall constitute all the notice of additions and betterments costing one thousand dollars or less required by (b) and (c) of this section. The notices provided in this paragraph may be given to the president of the Company unless the Company designates some other officer to receive the same, in which event the notice shall be given to such other officer.

(b) Any claim of the Companies for loss accruing to them by reason of expenditures for additions and betterments made to their property during Federal control in connection with or as a part of the work of maintaining, repairing, and renewing the Companies' property and chargeable under the accounting rules of the Commission in force December 31, 1917, to investment in road and equipment, except such expenditures as are incurred in connection with the replacement of buildings and structures in new locations, may be determined by agreement between the Director General and the Companies, or, failing such agreement as to the fact or amount of such loss, the questions at issue may, upon the application of the Director General or the Companies at any time after the filing of the statement of claim hereinafter referred to, be ascertained in the manner provided in section 3 of the Federal control act: Provided, however, that no loss shall be claimed by the Companies and no money shall be due them in respect of such additions and betterments upon the ground that the actual cost thereof at the time of construction was greater than under other market and commercial conditions; and for the purpose of determining such controversy the amount paid for any addition or betterment shall be deemed the fair and reasonable cost thereof and shall be taken as the basis for such determination;

nor unless the Companies, within sixty days of notice to them that the work will be done, shall give the Director General notice of objection thereto and shall file with the Director General a statement of claim within ninety days after notice of the completion of the work.

(c) Any claim of the Companies for loss accruing to them by reason of any additions and betterments which are not made in connection with or as a part of the work of maintaining, repairing, and renewing the Companies' property, or accruing to them in connection with maintenance in the replacement of buildings and structures in new locations, or by reason of road extensions, terminals, motive power, cars, or other equipment made to or provided for the property of the Companies during Federal control, may be determined by agreement between the Director General and the Companies, or failing such agreement as to the fact or amount of such loss, may, by proceedings instituted not later than six months after the end of Federal control, be ascertained in the manner provided in section 3 of the Federal control act: Provided, however, that no loss shall be claimed by the Companies and no money shall be due to them in respect of such additions, betterments, road extensions, terminals, motive power, cars, or other equipment mentioned in this paragraph upon the ground that the actual cost thereof at the time of construction or acquisition was greater than under other market and commercial conditions; and for the purpose of determining such con- [fol. 132] troversy the amount paid for any additions, betterments, road extensions, terminals, motive power, cars, or other equipment shall be deemed the fair and reasonable cost thereof and shall be taken as the basis of such determination; nor unless within sixty days after notice to the Company of such construction or acquisition written notice is given to the Director General by the Company that a loss will be claimed in respect thereof. With and as a part of such notice the Company shall state the objections to such construction or acquisition as far as reasonably practicable at the time. Nothing in this agreement shall be construed as barring the United States from contending that no loss within the meaning of the Federal control act accrued to the Companies by reason of any additions, betterments, or road extensions made during Federal control by order or approval of the Director General, if it is made to appear that the Companies themselves but for Federal control should in the exercise of sound judgment have made such addition, betterment, or road extension.

(d) Where additions, betterments, or road extensions or terminals, motive power, cars, or other equipment have been made to or provided for the property of the Companies during Federal control but prior to the execution of this agreement, the Director General shall not be required to give the notice thereof provided for in paragraph (a) of this section, and notice by the Company of any claim of loss in respect thereto may be given the Director General within ninety days after the execution hereof; and such claims shall thereafter be proceeded with in the manner provided in paragraph (b) or paragraph (c) of this section, as the case may be.

(e) The Director General shall reimburse the Companies for the amount of loss ascertained under this section with a proper adjustment of interest thereon.

(f) The Director General shall not acquire any motive power, cars, or other equipment at the expense, or on the credit, of the Companies in excess of what in his judgment is necessary, in addition to their then existing equipment, to provide for the traffic requirements of their own systems of transportation; but this provision shall not prevent the Director General, after the acquisition of such equipment, from using the same, or any part thereof, on the line of any other transportation system operated by him.

[fol. 133] Section 9—Final Accounting

Sec. 9 (a) At the end of Federal control all the property described in paragraph (a) of section 2 hereof shall be returned to the Companies, together with all repairs, renewals, additions, betterments, replacements, and road extensions thereto which have been made during Federal control, except as any part thereof may have been destroyed or retired and not replaced, in which case the provisions of section 5 hereof shall govern and except that the Director General shall not be obliged, otherwise than as provided in paragraph (i) of said section 5, to restore or replace property destroyed or damaged by the acts of public enemies.

(b) At the end of Federal control the Director General shall return to the Companies all uncollected accounts received by him from them and also materials and supplies equal in quantity, quality, and relative usefulness to that of the materials and supplies which he received, and to the extent that the Director General does not return such materials and supplies he shall account for the same at prices prevailing at the end of Federal control. To the extent that the Companies receive materials and supplies in excess of those delivered by them to the Director General they shall account for the same at the prices prevailing at the end of Federal control and the balance shall be adjusted in cash.

(c) The total amount of the account "Net balance receivable from agents and conductors" at the end of Federal control may be turned over by the Director General to the Company. He may also turn over all assets which have accrued out of operation; and the Company shall, to the extent of the cash received or realized from such assets, pay and charge to the Director General all expenses arising out of railway operations during Federal control, including reparation and other claims, and may, unless objection is made by the Director General, pay and charge to him any such expenses, including reparation and other claims, in excess of the cash so received or realized. On the first day of the third month following the termination of Federal control an accounting between the parties shall be had, and so on the first of each third month thereafter. Any balance found due either party shall be payable as of the date on which the account is stated and shall bear interest until paid.

(d) At the end of Federal control there shall be paid to the Companies any balance then remaining unpaid of the cash received from them at the beginning of or during Federal control, together with any unpaid interest which may have accrued upon the same. There shall also be paid to the Companies any funds created under the provisions of this agreement except to the extent that such funds may have been properly used under this agreement.

(e) Wherever under any provision of this section there is to be an adjustment of interest, it shall be at the rate of five per cent per annum, unless the parties shall in any case agree on a different rate.

(f) After Federal control no claim by or against the Director General shall be settled by the Companies against the written objection of the Director General or the Attorney General of the United States. The conduct of all litigation before any court or commission arising out of such disputed claims or out of operations during Federal control shall be in charge of the Companies' legal force and the expense thereof shall be paid by the Companies; but the Director General or the Attorney General may, at the expense of the United States, employ special counsel in connection with any such litigation.

[fol. 134] Section 10—Agreement Not to Affect Rights Involved in Certain Litigation

Section 10. (a) The execution of this agreement, the provisions thereof and any action pursuant thereto shall not prejudice or affect the rights of any party to the suit of the United States against the Southern Pacific Company and others now pending in the Supreme Court of the United States on appeal from the District Court of the United States for the District of Utah, in which the United States seeks among other things the dissolution of the control of the Southern Pacific Company over the Central Pacific Railroad and its branches by leases or otherwise, and over the capital stock of the Central Pacific Railway Company.

(b) The United States does not hereby confirm or recognize the validity of such control or leases, or ownership of stock.

(c) In the event of any decree of dissolution or division of interests, in that suit, all obligations under this agreement shall be correspondingly divided and allocated to the several parts in dissolution.

(d) The Director General and the Southern Pacific Company shall be deemed sufficiently represented by the present parties to this suit to be bound as privies (for the purposes of this agreement) by any decrees in that suit.

[fol. 135] Execution

In witness whereof, these presents have, on the day and year first above written, been duly signed, sealed and delivered by Walker D. Hines, Director General of Railroads, and by the Southern Pacific Company and by each of the Affiliated Companies, parties hereto of the second part, by their respective Presidents, or Chairmen of their respective Executive Committees, with their respective corporate seals hereto affixed, attested by their respective Secretaries or Assistant Secretaries; such execution and delivery on the part of said Companies having been duly authorized by their respective Boards of Directors at meetings duly called and held on various dates, said Boards of Directors having been thereto duly authorized, in the case of the Southern Pacific Company, at a meeting of the stockholders thereof duly called and held on the ninth day of October, 1918, at the principal office of the Company at Anchorage, Kentucky, and, as to the Affiliated Companies, by meetings of the stockholders thereof duly called and held at the principal offices of said Affiliated Companies, respectively, at various dates, as will appear by certificates of such meetings of said Boards and of said stockholders, duly attested by the respective Secretaries or Assistant Secretaries of said Companies, lodged with the Director General of Railroads.

Walker D. Hines, Director General of Railroads. (Seal.) Southern Pacific Company, by J. Kruttschnitt, President. (Seal.) Attest: Hugh Neill, Secretary. (Seal.) Arizona Eastern Railroad Company, by J. Kruttschnitt, Chairman of the Executive Committee. (Seal.) Attest: Hugh Neill, Assistant Secretary. (Seal.) Houston & Texas Central Railroad Company, by C. K. Dunlap, President. (Seal.) Attest: Hugh Neill, Assistant Secretary. (Seal.) The Galveston, Harrisburg and
[fol. 136] San Antonio Railway Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) Texas and New Orleans Railroad Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) The Houston East and West Texas Railway Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) Houston and Shreveport Railroad Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) Morgan's Louisiana
[fol. 137] and Texas Railroad and Steamship Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) Louisiana Western Railroad Company, by C. K. Dunlap, President. Attest: Hugh Neill, Secretary. (Seal.) Lake Charles and Northern Railroad Company, by C. K. Dunlap, President. Attest: Hugh Neill, Assistant Secretary. (Seal.) Iberia and Vermilion Railroad Company, by C. K. Dunlap, President. Attest: A. K. Van Deventer, Assitant Secretary (Seal.)

(Stamp:) I hereby certify that the foregoing is a true and correct copy. —— ——, Office Manager.

[fol. 138] Southern Pacific Company

Law Department

J. P. Blair, General Counsel; Gordon M. Buck, Ass't General Counsel.

165 Broadway, New York, February 27, 1919.

Mr. Nathan Matthews, Asst. General Counsel, United States Railroad Administration.

Dear Sir: I am authorized to agree, and do hereby agree, on behalf of the Southern Pacific Company and of the affiliated companies joined in the contract with the Director General, that, conditioned upon the execution and delivery of the contract, there may be deducted from its compensation for the first quarter of the year 1919 the amounts found due to the Director General under paragraphs (a) and (d) of Section 4 thereof, notwithstanding the provisions on the subject in Section 7 paragraph (b) of the contract.

Yours truly, J. P. Blair, General Counsel.

Feb. 27/19.

Contract delivered today on the faith of the above.

N. M.

Pursuant to due authority, I hereby certify that the foregoing is a true and correct copy of contract between the Director General of Railroads and the Southern Pacific Company and other Corporations, dated February 19, 1919.

Witness my hand and the seal of the United States Railroad Administration this 27th day of June, 1924.

A. C. Chaney, Assistant Chief Clerk for James C. Davis, Director General of Railroads. (Seal.)

[fol. 139] Supreme Court of the United States, October Term, 1923

No. 607

Standard Oil Company (New Jersey)

against

Southern Pacific Company and James C. Davis, Director General of Railroads

Exhibit B to Testimony of James C. Davis

At the execution of a Commission for the examination of witnesses, wherein Standard Oil Company (New Jersey) is petitioner

and Southern Pacific Company and James C. Davis, Director General of Railroads are respondents, this paper writing was produced and shown to James C. Davis and by him deposed unto at the time of his examination and marked Exhibit B before

Wm. Parkin, Commissioner.

Final Settlement Between the Director General of Railroads and the Southern Pacific Company and Other Corporations, December 19th, 1922

[fol. 140] Final Settlement

This agreement, entered into this 19th day of December, A. D. 1922, by and between James C. Davis, Director General of Railroads and Agent of the President, acting on behalf of the United States and the President, hereinafter called the "Director General," and the Southern Pacific Company, Arizona Eastern Railroad Company, Houston & Texas Central Railroad Company, The Galveston, Harrisburg and San Antonio Railway Company, Texas and New Orleans Railroad Company, The Houston East and West Texas Railway Company, Houston and Shreveport Railroad Company, Morgan's Louisiana and Texas Railroad and Steamship Company, Louisiana Western Railroad Company, Lake Charles and Northern Railroad Company, and Iberia and Vermilion Railroad Company, hereinafter called the "Companies,"

Witnesseth:

The said Companies, both jointly and severally, hereby acknowledge payment of the sum of Nine Million Two Hundred Fifty Thousand Dollars ($9,250,000.00) by the said Director General, the receipt whereof is hereby acknowledged, in full satisfaction and discharge of all claims, rights, and demands, of every kind and character, which the said Companies, or any of them, now have or hereafter may have or claim against the Director General, or any one representing or claiming to represent the Director General, the United States, or the President, growing out of or connected with the possession, use, and operation of the Companies' property by the United States during the period of Federal control, or out of the contract between the parties dated the 19th day of February, 1919; and the said Companies, both jointly and severally, hereby acknowledge the return to and receipt by them of all their property and rights which they are entitled to, and further acknowledge that the Director General has fully and completely complied with and satified all obligations on his part, or on the part of the United States, or the United States Railroad Administration, growing out of Federal control.

The purpose and effect of this instrument is to evidence a complete and final settlement of all demands, of every kind and character, as between the parties hereto, growing out of the Federal control of railroads, save and except that the following matters are not included in this adjustment and are not affected thereby:

Exceptions

1. The obligation on the part of the Companies, as expressed in the standard form of contract between the Director General and the Companies, as to the conduct of litigation arising out of Federal control (except as to claims and suits of carriers against the Director General or the United States), as same is stated in paragraph (f) of Section 9 of said contract, is to continue and is not affected by this settlement.

2. This settlement does not include or affect any moneys or assets of the Director General turned over to the Companies pursuant to General Order No. 68, the account created by this order to be adjusted as though this agreement had not been made.

3. This settlement does not include the obligations of the Director General assumed in paragraphs (i) and (j) of Section 4 of said con- [fol. 141] tract, to save the Companies harmless as to claims, if any, of third persons, or the obligations of the Director General in respect to the payment of taxes under Section 6 of the contract; provided further that this settlement does not include claims, suits, and judgments based on causes of action arising between twelve o'clock, noon, December 28th, 1917, and twelve o'clock, midnight, of December 31st, 1917, during which period the carriers assume all liability.

4. This settlement does not affect or alter any obligation executed by the Companies, or any of them, for amounts loaned, advanced or funded by the Director General, or amounts due by reason of any equipment trust agreements, all such obligations on the part of the Companies, or any of them, to remain in full force, the same as if this agreement had not been entered into.

In witness whereof, the parties to this agreement have duly signed, sealed, and executed, same in quadruplicate, such agreement being duly executed by the Chairman of the Executive Committee or Controller of each of said Companies, and attested by the Secretary or Assistant Secretary, with the corporate seal hereto annexed, the execution by the officers of the respective Companies having been duly authorized by a vote of the Executive Committee or the Board of Directors of each of said Companies.

James C. Davis, Director General of Railroads and Agent of the President. Southern Pacific Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Secretary. (Seal.) Arizona Eastern Railroad Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) Houston & Texas Central Railroad Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) The Galveston, Harrisburg and San Antonio Railway Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant

[fol. 142] Secretary. (Seal.) Texas and New Orleans Railroad Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) The Houston East and West Texas Railway Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) Houston and Shreveport Railroad Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) Morgan's Louisiana and Texas Railroad and Steamship Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) Louisiana Western Railroad Company, by (Signed) J. Kruttschnitt, Chairman of the Executive Committee. Attest: (Signed) Hugh Neill, Secretary. (Seal.) Lake Charles and Northern Railroad Company, by (Signed) A. D. McDonald, Controller. Attest: (Signed) Hugh Neill, Assistant Secretary. (Seal.) Iberia and Vermilion Railroad Company, by (Signed) A. D. McDonald, Controller. Attest: (Signed) A. K. Van Deventer, Assistant Secretary. (Seal.)

Pursuant to due authority, I hereby certify that the foregoing is a true and correct copy of final settlement agreement between the Director General of Railroads and the Southern Pacific Company and other Corporations, dated December 19, 1922.

Witness my hand and the seal of the United States Railroad Administration this 27th day of June, 1924.

A. C. Chaney, Assistant Chief Clerk for James C. Davis, Director General of Railroads. (Seal.)

[fol. 143] Leo J. Tracy, aged 34 years and upwards, being duly and publicly sworn and examined on the part of the petitioner, doth depose and say as follows:

First. State your name, age, residence and present occupation.

In answer to the first interrogatory he saith: My name is Leo J. Tracy; I am 34 years old; I am a resident of Washington, D. C.; my occupation is Comptroller of the United States Railroad Administration.

Second. What position or positions did you occupy between August 1, 1918 and August 1, 1924?

In answer to the second interrogatory he saith: From August 1st, 1918, to December 9th, 1918, I was comptroller of the Chicago, Milwaukee & St. Paul Railroad Company; from December 9, 1918, to January 1, 1921, I was an accounting assistant on the Staff of the Railroad Administration; on January 1, 1921, I was appointed Comptroller of the Railroad Administration, and have served in that capacity up to the present time.

Third. At or about the time when, or at some time after, the Railroad Administration took over the properties of the Southern Pacific Company and its subsidiaries in pursuance of the Act of Congress of August 26, 1916, Chapter 418, Paragraph 1, 39 Stats. 645, and of the proclamation of the President of December 16, 1917, was there an agreement in writing entered into by and between the [fol. 144] Southern Pacific Company and/or its subsidiaries with the United States?

In answer to the third interrogatory he saith: Yes.

Fourth. If you answer the third interrogatory in the affirmative, will you please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause?

In answer to the fourth interrogatory he saith: A copy of the agreement has been handed to the Commissioner by Mr. Davis and marked "Exhibit A."

Fifth. After the loss of the steamship Proteus whilst in possession of the Director General of Railroads on August 19, 1918, were there any negotiations had been the Director General of Railroads and the Southern Pacific Company in connection with a payment to the Southern Pacific Company by and in behalf of the Director General of Railroads for the loss of the Proteus?

In answer to the fifth interrogatory he saith: Yes.

Sixth. If you answer the preceding interrogatory in the affirmative, state when these negotiations began and by whom they were conducted on behalf of the Director General of Railroads and on behalf of the Southern Pacific Company?

In answer to the sixth interrogatory he saith: The final settlement with the Southern Pacific Company was the subject of investigation [fol. 145] for several months prior to December 19th, 1922. This settlement involved a claim on the part of the Southern Pacific Company growing out of the use and operation of its property during the period of Federal control, which aggregated $54,252,694.57, and included in this claim was the claim for the loss of the Steamship Proteus. The negotiations leading up to the final settlement were conducted solely by the Director General and his staff. The Staff was composed of the late E. M. Alvord, Director Division Liquidation of Claims; Alex. W. Smith, Special Counsel; L. J. Tracy, Comptroller and D. C. Porteous, Director Division on Finance. The negotiations leading to a final settlement covered a number of meetings and conferences from perhaps the 20th of November to the date of the final settlement, December 19th, 1922.

Seventh. Were any of these negotiations in writing in the form of letters, telegrams or other writings?

In answer to the seventh interrogatory he saith: None of the negotiations were in writing, and all were had in oral conference.

Eighth. If you answer the preceding interrogatory in the affirmative, please produce true copies of any letters, telegrams, or other writings exchanged between the Director General of Railroads and/or any of his agents or employees, and the Southern Pacific Company and/or any of its agents or employees, in connection with such [fol. 146] negotiations, and hand them to the Commissioner to be marked and used as exhibits in this cause.

In answer to the eighth interrogatory he saith: So far as I am advised, there were no written communications such as requested in the foregoing interrogatory.

Ninth. If you state that there were negotiations had, as asked in the Fifth, Sixth, Seventh and Eighth Interrogatories, will you state whether, as a result of those negotiations, there was any agreement reached as to the amount which should be paid by the Railroad Administration to the Southern Pacific Company for the loss of the Proteus?

In answer to the ninth interrogatory he saith: Included in the property of the Southern Pacific Company taken over by the Government were the Steamship Proteus and other property owned and operated by the railroad known as the Atlantic Steamship Lines. A list of the property and ships included in the Atlantic Steamship Lines property taken over is found in Section 2 of the standard contract, a copy of which is attached to the answer to Interrogatory 4. During Federal control the Lighter Confidence and the Steamship Proteus were sunk. In this connection, there were claims made by the Southern Pacific Company for undermaintenance of the floating equipment and property taken over by the Government as part of the Atlantic Steamship Lines, and claims for excess maintenance [fol. 147] against the Company by the Government on account of this property. On or about the 20th of November, 1922, a conference was had between Mr. Frank C. Wright and other representatives of the Railroad Administration (Mr. Wright represented the Railroad Administration in admiralty matters) and Mr. A. D. McDonald, Vice-President and Comptroller of the Southern Pacific Company, and other representatives of the Company. This conference was for the purpose of enabling Mr. Wright to recommend to the Director General and his Staff his view of a fair adjustment of the disputed items in the claim of the Southern Pacific Company covering the destruction of the Barge Confidence, the loss of the Steamship Proteus, and the disputed items of over and under maintenance. As a result of this conference, Mr. Wright recommended to the Director General and his Staff the following adjustment of the items above referred to:

Allowance to the Company for undermaintenance of terminals, $20,000. Allowance to the Director General for excess maintenance of floating equipment, $235,000. This was a net allowance to the Railroad Administration of $215,000 excess maintenance.

It was further recommended that the Railroad Administration allow the Company for the value of the Steamship Proteus and the Lighter Confidence a lump sum of $885,000. It is perhaps fair to state that the amount claimed for the loss of the Lighter Confidence was $16,664.

[fol. 148] As a result of these various credits, and debits, it was recommended by Mr. Wright that the Director General allow the Southern Pacific Company the sum of $670,000. This recommendation made by Mr. Wright was for the purpose of assisting the Director General and his Staff in concluding a final adjustment of all of the claims which the Southern Pacific Company was making

against the Government for the use of its property during the period of Federal control.

Tenth. If you answer the Ninth Interrogatory in the affirmative, will you please state when such an agreement was reached and what amount the Director General of Railroads agreed to pay to the Southern Pacific Company for the loss of the Proteus?

In answer to the tenth interrogatory he saith: A final adjustment was made with the Southern Pacific Company on the 19th of December, 1922, in which the Director General of Railroads agreed to pay and did pay to the Southern Pacific Company the sum of $9,250,000 in cash. This was a lump sum adjustment of the entire claim made by the Southern Pacific Company, which aggregated $54,252,694.57.

Eleventh. Was there any written contract entered into by and between the Director General of Railroads and the Southern Pacific Company embodying the agreement mentioned in the Ninth and Tenth Interrogatories?

[fol. 149] In answer to the eleventh interrogatory he saith: Yes.

Twelfth. If you answer the Eleventh Interrogatory in the affirmative, please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

In answer to the twelfth interrogatory he saith: A copy of the final settlement agreement was handed to the Commissioner by Mr. Davis, and marked Exhibit B.

Thirteenth. If there was not any formal written agreement, please produce any letters, telegrams, or other documents or writings which may have embodied the final agreement by and between the Director General of Railroads and the Southern Pacific Company as to the amount which was to be paid for the loss of the Proteus.

In answer to the thirteenth interrogatory he saith: "Exhibit B," the final settlement agreement handed to the Commissioner by Mr. Davis is the only writing that was entered into evidencing the settlement. There were no agreements of adjustment other than the one referred to.

Fourteenth. If you answer the Ninth and Tenth Interrogatories in the negative, state whether or not an item representing the amount to be paid for the loss of the Proteus appeared in any schedule of items embodied in any general settlement between the Director General of Railroads and the Southern Pacific Company?

[fol. 150] In answer to the fourteenth interrogatory he saith: The Director General of Railroads, in concluding settlements with the respective carriers whose property was taken over by the Government and operated during the period of Federal control, made no itemized statement showing the amounts that were paid on each item in dispute, which was in any wise communicated to the Company making such settlement, but all of the settlements were what are known as lump sum, in which all items in dispute were included in the final amount offered.

It is only fair to say, however, that in making each of these settlements the Railroad Administration kept a record, which was exclusively for the use of the Railroad Administration, and was not in

any wise communicated to the carriers, showing how the lump sum settlement was finally arrived at, and in the records of the Railroad Administration there appear the items showing how this lump sum was arrived at in making the adjustment with the Southern Pacific Company.

The Company claimed for the loss of the Steamship Proteus $1,268,090.26 and for the loss of the Barge Confidence $16,663.80, and, in arriving at the lump sum, the Railroad Administration made an allocation and apportionment on these two items of $885,000.

It is perhaps only fair to state that this allocation and apportion- [fol. 151] ment was made in connection with the adjustment of very many items in dispute, covering an aggregate claim in excess of $54,000,000 and no definite agreement as to specific items was made with the Company at the time of the final adjustment.

Fifteenth. If you answer the Fourteenth Interrogatory in the affirmative, state the amount of the item representing the amount to be paid for the loss of the Proteus.

In answer to the fifteenth interrogatory he saith: This is covered by the answer to Interrogatory 14.

Sixteenth. If you state an amount in answer to the Ninth and Tenth Interrogatories and/or in answer to the Fourteenth and Fifteenth Interrogatories which fixed the amount of payment to be made for the loss of the Proteus, state whether or not that amount included interest from the date of the loss, and if it did not, whether any other or further payment was made on account of interest on the said amount.

In answer to the sixteenth interrogatory he saith: There was no allowance of interest made on this item.

Seventeenth. If in answer to the Ninth and Tenth Interrogatories and/or the Fourteenth and Fifteenth Interrogatories, you have stated an amount agreed to be made as a payment for the loss of the Proteus,

(a) State whether or not in arriving at that amount you took into consideration the value of the Proteus which had been fixed by [fol. 152] the Commissioner and by the United States District Court for the Southern District of New York in this litigation?

(b) If you did not take into consideration the value of the Proteus fixed by the Commissioner and the said United States District Court in this case, will you state on what you based the amount to be paid by the Director General of Railroads to the Southern Pacific Company for the loss of the Proteus.

In answer to the seventeenth interrogatory he saith:

A. The Director General and his Staff and also Mr. Wright had knowledge of the allowance made by the United States District Court in this litigation, and that was one of the matters considered in making the adjustment, but I cannot say that it was controlling.

B. There was a very careful examination, from all available sources, made as to the actual value of the Proteus at the time of its loss, and while, as heretofore stated, the finding of the court was one of the items which influenced the result, the final result was obtained from all sources of information available to the Director General.

Eighteenth. Was the agreed amount to be paid for the loss of the Proteus ever paid by the Director General of Railroads to the Southern Pacific Company?

In answer to the eighteenth interrogatory he saith: The only pay-
[fol. 153] ment made to the Southern Pacific Company was the final payment made in accordance with the agreement of final settlement.

Nineteenth. If you answer the Eighteenth Interrogatory in the affirmative, will you state the date of this payment, the total amount thereof, and the person to whom it was made?

In answer to the nineteenth interrogatory he saith: The total amount of the payment was $9,250,000. It was made by check payable to the Southern Pacific Company drawn by the Treasurer of the Railroad Administration.

Twentieth. Was there any final written agreement of settlement made between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other?

In answer to the twentieth interrogatory he saith: Yes.

Twenty-first. If you answer the Twentieth Interrogatory in the affirmative, will you state when this final agreement of settlement was made and by whom it was signed on behalf of the several parties?

In answer to the twenty-first interrogatory he saith: Copy of the final settlement agreement was handed to the Commissioner by Mr. Davis in answer to Interrogatory No. 12, and showed the parties by whom it was signed.

Twenty-second. If you state there was such an agreement, will you please produce a true copy thereof and hand it to the Commis-
[fol. 154] sioner to be marked as an exhibit and used in this cause?

In answer to the twenty-second interrogatory he saith: A copy has heretofore been produced by Mr. Davis and marked "Exhibit B" in his testimony.

Twenty-third. If it is a fact that there was a lump sum settlement made by and between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other, will you state what the amount of that lump sum settlement was and what was allowed in such lump sum settlement on account of the loss of the steamship Proteus?

In answer to the twenty-third interrogatory he saith: As heretofore fully explained, there was a lump sum settlement, but there was no allowance on any particular items, except as heretofore stated.

Twenty-fourth. In pursuance of the final settlement, were there any releases exchanged by and between the Railroad Administration and the Southern Pacific Company and its subsidiary companies?

In answer to the twenty-fourth interrogatory he saith: Yes.

Twenty-fifth. If you answer the Twenty-fourth Interrogatory in the affirmative, will you please produce and hand to the Commissioner to be marked and used as exhibits a true copy or copies of any
[fol. 155] and all such releases?

In answer to the twenty-fifth interrogatory he saith: "Exhibit B" is a full and complete copy of all releases evidencing the final settlement.

Twenty-sixth. (a) Were there any oral negotiations on the subject of the value of the Proteus?

(b) If so, where did they occur and between what persons were they held?

In answer to the twenty-sixth interrogatory he saith: A. Yes.

B. This question has been heretofore fully answered.

Twenty-seventh. (a) During the negotiations was either the Director General of Railroads or the Southern Pacific Company represented by any lawyer?

(b) If so, what was the name of the lawyer representing the Director General of Railroads and what was the name of the lawyer representing the Southern Pacific Company?

(c) If you state that there were lawyers and give their names, will you please state to what firm or firms the said lawyers belonged?

In answer to the twenty-seventh interrogatory he saith: So far as I am advised, the lawyer representing the Southern Pacific Company was Mr. J. P. Blair, its General Counsel, and the lawyer representing the Railroad Administration was Mr. Alex. W. Smith, Special Counsel.

[fol. 156] B. This inquiry has been heretofore answered.

C. This inquiry has been heretofore answered.

Twent-eighth. Did the Director General of Railroads receive any letters written by a lawyer or lawyers representing the Southern Pacific Company regarding a settlement for the loss of the Proteus?

In answer to the twenty-eighth interrogatory he saith: He did not.

Twenty-ninth. If he did, will you please produce a true copy of such letter or letters and hand them to the Commissioner to be marked and used in this cause?

In answer to the twenty-ninth interrogatory he saith: There were none.

Thirtieth. If there are within your knowledge any other facts or circumstances or writing in connection with said agreement on the amount which was paid for the loss of the Proteus or the actual payment made by the Director General for the loss of the Proteus, about which you have not been specifically interrogated in the foregoing interrogatories, state fully such facts and circumstances as are within your knowledge and produce any such writings to be marked by the Commissioner and used as exhibits herein.

In answer to the thirtieth interrogatory he saith: I have no information other than heretofore given.

Leo J. Tracy.

[fol. 157] Examination take-, reduced to writing, and by the witness subscribed and sworn to this 1st day of July, 1924, before Wm. Parkin, Commissioner.

[fol. 158] Deposition of a witness, produced, sworn and examined, the 11th day of July, in the year one thousand nine hundred and twenty-four at New York City, under and by virtue of an order is-

sued out of the Supreme Court of the United States, in a certain cause therein depending and at issue, wherein Standard Oil Company (New Jersey) is petitioner and Southern Pacific Company and James C. Davis, Director General of Railroads, are respondents, as follows:

RALPH BLAISDELL, of Orange, New Jersey, Treasurer of the Wickwire-Spencer Steel Corporation, aged fifty-nine years and upwards, being duly and publicly sworn and examined on the part of the petitioner, doth depose and say as follows:

First. State your name, age, residence and present occupation.

First. To the first interrogatory he saith: My name is Ralph Blaisdell; my age is fifty-nine; my residence, East Orange, New Jersey, and I am Treasurer of the Wickwire-Spencer Steel Corporation.

Second. What position or positions did you occupy between August 1, 1918, and August 1, 1924?

Second. To the second interrogatory he saith: From August 1, [fol. 159] 1918 to January 1, 1920, I was Federal Treasurer of the Oregon & Washington Railroad & Navigation Company and San Francisco & Portland Steamship Company. From February 1, 1920 to January 31, 1924, I was Treasurer of the United States Railroad Administration. From February 1, 1924, to date, I have been Treasurer of the Wickwire-Spencer Steel Corporation.

Third. At or about the time when, or at some time after, the Railroad Administration took over the properties of the Southern Pacific Company and its subsidiaries in pursuance of the Act of Congress of August 26, 1916, Chapter 418, Paragraph 1, 39 Stats. 645, and of the proclamation of the President of December 16, 1917, was there an agreement in writing entered into by and between the Southern Pacific Company and/or its subsidiaries with the United States?

Third. To the third interrogatory he saith: Yes.

Fourth. If you answer the third interrogatory in the affirmative, will you please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause?

Fourth. To the fourth interrogatory he saith: I do not have a copy of this agreement, but I understand such a paper has been introduced in connection with other depositions which have been taken.

Fifth. After the loss of the steamship Proteus whilst in possession [fol. 160] of the Director General of Railroads on August 19, 1918, were there any negotiations had between the Director General of Railroads and the Southern Pacific Company in connection with a payment to the Southern Pacific Company by and in behalf of the Director General of Railroads for the loss of the Proteus?

Fifth. To the fifth interrogatory he saith: Yes.

Sixth. If you answer the preceding interrogatory in the affirma- [fol. 160] tive, state when the negotiations began and by whom they were conducted on behalf of the Director General of Railroads and on behalf of the Southern Pacific Company?

Sixth. To the sixth interrogatory he saith: The information called for by this interrogatory is not within my personal knowledge.

Seventh. Were any of these negotiations in writing in the form of letters, telegrams or other writings?

Seventh. To the seventh interrogatory he saith: I do not know whether any of the negotiations were in written form.

Eighth. If you answer the preceding interrogatory in the affirmative, please produce true copies of any letters, telegrams, or other writings exchanged between the Director General of Railroads and/or any of his agents or employees, and the Southern Pacific Company and/or any of its agents or employees, in connection with such negotiations, and hand them to the Commissioner to be marked [fol. 161] and used as exhibits in this cause.

Eighth. To the eighth interrogatory he saith: I am not in position to furnish copies of any writings which may have passed between the parties in connection with such negotiations as were had nor did I ever see them.

Ninth. If you state that there were negotiations had, as asked in the Fifth, Sixth, Seventh, and Eighth interrogatories, will you state whether, as a result of those negotiations, there was any agreement reached as to the amount which should be paid by the Railroad Administration to the Southern Pacific Company for the loss of the Proteus?

Ninth. To the ninth interrogatory he saith: The information called for in this interrogatory is not within my personal knowledge.

Tenth. If you answer the Ninth Interrogatory in the affirmative, will you please state when such an agreement was reached and what amount the Director General of Railroads agreed to pay to the Southern Pacific Company for the loss of the Proteus?

Tenth. To the tenth interrogatory he saith: This interrogatory is not within my personal knowledge.

Eleventh. Was there any written contract entered into by and between the Director General of Railroads and the Southern Pacific Company embodying he agreement mentioned in the Ninth and [fol. 162] Tenth Interrogatories?

Eleventh. To the eleventh interrogatory he saith: Yes.

Twelfth. If you answer the Eleventh Interrogatory in the affirmative, please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

Twelfth. To the twelfth interrogatory he saith: I do not have the copy of such agreement but I understand such a paper has been introduced in connection with other depositions which have been taken.

Thirteenth. If there was not any formal written agreement, please produce any letters, telegrams, or other documents or writings which may have embodied the final agreement by and between the Director General of Railroads and the Southern Pacific Company as to the amount which was to be paid for the loss of the Proteus?

Thirteenth. To the thirteenth interrogatory he saith: As stated in my reply to interrogatory number eleven there was a formal written

contract entered into covering the settlement which was made with the Southern Pacific Company.

Fourteenth. If you answer the Ninth and Tenth Interrogatories in the negative, state whether or not an item representing the amount to be paid for the loss of the Proteus appeared in any schedule of items embodied in any general settlement between the Director Gen- [fol. 163] eral of Railroads and the Southern Pacific Company?

Fourteenth. To the fourteenth interrogatory he saith: The information called for by this interrogatory is not within my personal knowledge.

Fifteenth. If you answer the Fourteenth Interrogatory in the affirmative, state the amount of the item representing the amount to be paid for the loss of the Proteus.

Fifteenth. To the fifteenth interrogatory he saith: The information called for by this interrogatory is not within my personal knowledge.

Sixteenth. If you state an amount in answer to the Ninth and Tenth Interrogatories and/or in answer to the Fourteenth and Fifteenth Interrogatories which fixed the amount of payment to be made for the loss of the Proteus, state whether or not that amount included interest from the date of the loss, and if it did not, whether any other or further payment was made on account of interest on the said amount.

Sixteenth. To the sixteenth interrogatory he saith: The information called for by this interrogatory is not within my personal knowledge.

Seventeenth. If in answer to the Ninth and Tenth Interrogatories and/or the Fourteenth and Fifteenth Interrogatories, you have stated an amount agreed to be made as a payment for the loss of [fol. 164] the Proteus,

(a) State whether or not in arriving at that amount you took into consideration the value of the Proteus which had been fixed by the Commissioner and by the United States District Court for the Southern District of New York in this litigation?

(b) If you did not take into consideration the value of the Proteus fixed by the Commissioner and the said United States District Court in this case, will you state on what you based the amount to be paid by the Director General of Railroads to the Southern Pacific Company for the loss of the Proteus.

Seventeenth. To the seventeenth interrogatory he saith: The information called for by this interrogatory is not within my personal knowledge.

Eighteenth. Was the agreed amount to be paid for the loss of the Proteus ever paid by the Director General of Railroads to the Southern Pacific Company?

Eighteenth. To the eighteenth interrogatory he saith: The only payment made to the Southern Pacific Company was the final payment made in accordance with the written contract of final settlement referred to in my reply to interrogatory number thirteen.

Nineteenth. If you answer the Eighteenth Interrogatory in the

affirmative, will you state the date of this payment, the total amount thereof, and the person to whom it was made?

[fol. 165] Nineteenth. To the nineteenth interrogatory he saith: December 19, 1922, $9,250,000. The check given was drawn to the order of Southern Pacific Company.

Twentieth. Was there any final written agreement of settlement made between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other?

Twentieth. To the twentieth interrogatory he saith: Yes.

Twenty-first. If you answer the Twentieth Interrogatory in the affirmative, will you state when this final agreement of settlement was made and by whom it was signed on behalf of the several parties?

Twenty-first. To the twenty-first interrogatory he saith: I do not have this information by me but it can no doubt be had by consulting the copy of the final settlement agreement which was introduced in connection with the other depositions which have been taken.

Twenty-second. If you state there was such an agreement, will you please produce a true copy thereof and hand it to the Commissioner to be marked as an exhibit and used in this cause?

Twenty-second. To the twenty-second interrogatory he saith: I do not have a copy of this agreement but I understand such a paper has [fol. 166] been introduced in connection with other depositions which have been taken.

Twenty-third. If it is a fact that there was a lump sum settlement made by and between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other, will you state what the amount of that lump sum settlement was and what was allowed in such lump sum settlement on account of the loss of the steamship Proteus?

Twenty-third. To the twenty-third interrogatory he saith: The information called for by this interrogatory is not within my personal knowledge.

Twenty-fourth. In pursuance of the final settlement, were there any releases exchanged by and between the Railroad Administration and the Southern Pacific Company and its subsidiary companies?

Twenty-fourth. To the twenty-fourth interrogatory he saith: Yes.

Twenty-fifth. If you answer the Twenty-fourth Interrogatory in the affirmative, will you please produce and hand to the Commissioner to be marked and used as exhibits a true copy or copies of any and all such releases?

Twenty-fifth. To the twenty-fifth interrogatory he saith: The final settlement agreement which has been introduced in connection with other depositions which have been taken recites in full the releases [fol. 167] exchanged by the contracting parties. I do not have a copy of this agreement.

Twenty-sixth. (a) Were there any oral negotiations on the subject of the value of the Proteus?

(b) If so, where did they occur and between what persons were they held?

Twenty-sixth. To the twenty-sixth interrogatory he saith: The in-

formation called for by this interrogatory is not within my personal knowledge.

Twenty-seventh. (a) During the negotiations was either the Director General of Railroads or the Southern Pacific Company represented by any lawyer?

(b) If so, what was the name of the lawyer representing the Director General of Railroads and what was the name of the lawyer representing the Southern Pacific Company?

(c) If you state that there were lawyers and give their names, will you please state to what firm or firms the said lawyers belonged?

Twenty-seventh. To the twenty-seventh interrogatory he saith: The information called for by this interrogatory is not within my personal knowledge.

Twenty-eighth. Did the Director General of Railroads receive any letters written by a lawyer or lawyers representing the Southern Pacific Company regarding a settlement for the loss of the Proteus? [fol. 168] Twenty-eighth. To the twenty-eighth interrogatory he saith: The information called for by this interrogatory is not within my personal knowledge.

Twenty-ninth. If he did, will you please produce a true copy of such letter or letters and hand them to the Commissioner to be marked and used in this cause.

Twenty-ninth. To the twenty-ninth interrogatory he saith: I do not know whether there were any such letter or letters.

Thirtieth. If there are within your knowledge any other facts or circumstances or writing in connection with said agreement on the amount which was paid for the loss of the Proteus or the actual payment made by the Director General for the loss of the Proteus, about which you have not been specifically interrogated in the foregoing interrogatories, state fully such facts and circumstances as are within your knowledge and produce any such writings to be marked by the Commissioner and used as exhibits herein.

Thirtieth. To the thirtieth interrogatory he saith: I have no information other than that which I have already given.

There were no cross-interrogatories.

Ralph Blaisdell.

Examination taken, reduced to writing, and by the witness subscribed and sworn to, this 14th day of July, 1924, before Wm. Parkin, Commissioner.

[fol. 169] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION FOR PRINTING AMENDED RETURN—Filed Aug. 20, 1924

It is hereby stipulated and agreed by and between the counsel for the respective parties herein that the original return of William

Parkin, the Commissioner in this case, filed with the Clerk of this Court on July 17th, 1924, need not be printed with the record of the case, but that the amended return of the Commissioner, filed on July 25th, be printed in place of the original return.

Dated, N. Y. August 12th, 1924.

John M. Woolsey, Counsel for Petitioner. Charles C. Burlingham, Counsel for Respondents.

[fol. 170] [File endorsement omitted.]

[fol. 171] [File endorsement omitted.]

SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY (NEW JERSEY), as owner of steamship *Cushing*, Petitioner, *against* SOUTHERN PACIFIC COMPANY, as owner of steamship *Proteus* and others, Respondents.	October Term 1923.

SIRS:

PLEASE TAKE NOTICE that a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit will be submitted to the Supreme Court of the United States at the opening of court on the 22nd day of October, 1923, or as soon thereafter as counsel can be heard.

Dated, New York, October 8, 1923.

Yours, etc.
KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for Petitioner.

To:
Burlingham, Veeder, Masten & Fearey, Esqs.,
Bigham, Englar & Jones, Esqs.,
Honorable William Hayward, Esq.,
United States Attorney.
Harold J. Roig, Esq.,
Foley & Martin, Esqs.,
Henry O. Falk, Esq.,
Frank M. Patterson, Esq.,
Cohen Brothers, Esqs.,
Edward B. Levy, Esq.,
Proctors for Respondents.

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SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY (NEW JERSEY), Petitioner, *vs.* SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads, et al, Respondents.	October Term, 1923. No.....

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Standard Oil Company (New Jersey), respectfully shows unto this Court as follows:

I.

STATEMENT OF FACTS AND MATTERS INVOLVED.

FIRST: Your petitioner is and was at all times hereinafter mentioned a corporation duly organized and exist-

ing under the laws of the State of New Jersey, and the owner of the tank steamship *Cushing*.

SECOND: On December 28, 1917, pursuant to Act of Congress of August 26, 1916, Chap. 418, Par. 1, 39 Stat. 645, and under the Proclamation of the President of December 26, 1917, the steamship *Proteus*, owned by the Southern Pacific Company, was taken into the possession and control of the Director General of Railroads, and was thereafter manned, operated, and navigated at the expense of the Director General of Railroads, under his sole control, including the time of the collision hereinafter mentioned. Vol. I, fols. 102-107. The Director General of Railroads was in legal effect the demise charterer in possession of the *Proteus*, which, unless lost, would have continued under the sole control of the Railroad Administration until March 1, 1920; Transportation Act of 1920, Section 200 (a).

THIRD: On or about August 19, 1918, while the said steamship *Proteus* was in the possession and control of the Director General of Railroads, and manned by its servants, as aforesaid, a collision occurred between the said steamship *Cushing*, and the *Proteus*, with the result that the steamship *Proteus* and her cargo were totally lost.

FOURTH: After the accident, petitions for limitation of liability were filed on behalf of both vessels. The Director General of Railroads as the demise charterer, and as co-petitioner with the Southern Pacific Company, claimed the benefits of its limitation of liability provided by Sections 4283-4286 of the Revised Statutes being

represented on the record by Burlingham, Veeder, Masten, and Fearey; and, Roscoe H. Hupper, Vol I. Fol. 127. Although the Southern Pacific Company was owner of the *Proteus* and a co-petitioner in these proceedings, the real party in interest was the Railroad Administration, because the Railroad Administration had sole possession and control of the steamship *Proteus* as aforesaid and of the two would have been the only party which could properly have been held liable for any damage caused by her loss.

FIFTH: The merits of the collision case were tried out in the United States District Court for the Southern District of New York, and a decision holding both vessels at fault was rendered, with reference to a commissioner to ascertain the damages. Vol. I, pages 509-522; *The Cushing, The Proteus,* 266 Fed. Rep. 570.

SIXTH: The damages were assessed, after extensive proofs before an experienced Commissioner, who heard all the witnesses. The Commissioner awarded "the sum of $750,000, with interest thereon from August 19, 1918, the date of the loss", as the value of the *Proteus,* after considering all relevant facts bearing on the question of "value". Vol. II. Fol. 2544.

SEVENTH: The findings of the Commissioner as to "the value" of the *Proteus* were reviewed on exceptions by the District Court, Circuit Judge Mack sitting; and, after a well-considered opinion, the exceptions were overruled and the Commissioner's findings confirmed. Vol. II, pages 854-862; *The Cushing,* 285 Fed. Rep. 617. Circuit Judge Mack expressly confirmed and adopted the rule as applied by the Commissioner that "all the

relevant facts should be considered'' in arriving at the fair recompense to the owner. Vol. II. Fol. 2568.

EIGHTH: The causes under the limitation proceedings were consolidated by order of the United States District Court of November 6, 1922, Vol. II, pp. 863-864; and final decree was entered in the United States District Court on November 28, 1922. Vol. II. Fol. 2604.

NINTH: The Standard Oil Company (New Jersey) appealed from the final decree on the merits on December 27, 1922, and the Southern Pacific Company appealed from the decree in so far as the value of the *Proteus* was fixed therein, on January 27, 1923. The Director General of Railroads, the real party in interest, did not take any appeal.

The appeals came on to be heard before the Circuit Court of Appeals for the Second Circuit, and that Court, in its opinion handed down July 16, 1923, affirmed the decree of the District Court on the merits, but modified the award for the item of damage representing the value of the steamship *Proteus*, by allowing the sum of $1,225,000 for that item, as against $750,000, which had been awarded by the Commissioner and affirmed by the District Court; that is, the value of the *Proteus* was increased by $475,000, which is an addition of 63⅓% of the original award. The order of that Court to which this petition for certiorari is directed was entered in the Circuit Court of Appeals on July 23, 1923.

TENTH: The high figure which the Circuit Court of Appeals awarded, viz. $1,225,000, was obtained by taking

$1,750,000 as an "estimated cost" of reconstructing the *Proteus* anew, and deducting from it the sum of $525,000, as depreciation at two and one-half per cent per year for the eighteen years of age of the vessel. Vol. II. Fols. 1607-1610.

ELEVENTH: At the time that the collision occurred, the situation was that the Southern Pacific Company as the innocent owner of the *Proteus,* had a claim against the Director General of Railroads for her value at the time of her loss.

That loss has been held to be due in part to negligence of the servants of the Director General of Railroads who were operating her at the time of the collision.

The Southern Pacific Company at the time of the loss had also a claim against the owners of the *Cushing* for the same tort.

Consequently, the apparent line-up of the parties with the Director General of Railroads and the Southern Pacific Company on the one side and the Standard Oil Company on the other side, does not represent a true analysis of the legal relationships.

The real legal relationship is that the Southern Pacific Company had a claim against two parties—the Standard Oil Company (New Jersey) and the Railroad Administration, who together, as the decisions have proved, were joint tort feasors causing the loss of the Southern Pacific Company's steamer *Proteus.*

Since the expiration of the Term of the Circuit Court of Appeals, it has come to the attention of counsel in this case, through proper and reliable sources, that a final settlement had been arrived at between the Railroad

Administration and the Southern Pacific Company by which the liability of the Railroad Administration for the loss of the *Proteus* has been finally satisfied and extinguished by a payment, credit, or adjustment on the basis of the value found by the Commissioner and confirmed by the District Court, namely, $750,000. This settlement was made, the petitioner is informed, between the time of the decision of the District Court and that of the Circuit Court of Appeals.

The situation, therefore, is singular. Because in addition to the ordinary application for a writ of certiorari which is being put forward and had been planned to be put forward by the petitioner, since the decision of the Circuit Court of Appeals for the reasons hereinafter mentioned, a situation exists, it is believed by counsel for the petitioner, in which settlement by the Director General of Railroads with the Southern Pacific Company has extinguished any claim by the Southern Pacific Company against the Standard Oil Company because it is a settled rule of law in admiralty as well as at common law that a settlement with one joint tort feasor of a claim by the damaged party, precludes the continuance of the claim for the same loss by the damaged party against the other tort feasor.

In any event, the Southern Pacific Company should not be allowed to claim from the petitioner more than it has agreed with its demise charterer, the Railroad Administration, as the value of the *Proteus* and the basis for its damages for the loss of the *Proteus* through that charterer's fault.

TWELFTH: The term of the Circuit Court of Appeals for the Second Circuit is held annually. The annual term commences by Rule 3 of that Court on the first day of October in each year. Therefore the term at which the decision in the instant case was made,—the October Term, 1922, of the Circuit Court of Appeals for the Second Circuit,—expired on September 30, 1923.

Owing to the fact that the term of the Circuit Court of Appeals had expired when the facts above adverted to were learned by the counsel for the petitioner, they are not in a position to make any application for relief of any kind in the Circuit Court of Appeals.

Naturally the facts just noted are not included in the Record on Appeal here and the only method by which the petitioner will be able to receive any relief is to have this Court grant a writ of certiorari to review the question of damages for the reasons hereinafter stated and then to provide for the taking of such evidence or the discovery of such documents as may be necessary to establish the precise facts regarding the settlement referred to, in order that this Court may be in a position to determine what legal results may have flowed therefrom.

THIRTEENTH: Certainly it is an extraordinary situation where A having a right against B for the recovery of the value of a vessel sunk by the joint fault of B and C, should agree with B that the value of the vessel is $750,000, and settle accordingly, and then proceed to claim a value of $1,225,000 against C on a claim which must have been extinguished by the act of settlement between A and B.

The situation is so singular that it is respectfully urged that this Court find some way in which to deal with the whole situation on certiorari and enable the petitioner to escape from the certainty, which unless certiorari is granted, it now faces of having to account for $475,000 more for the loss of the *Proteus* than was agreed on as her value between her owner and her tort feasor charterer by whose contributing wrong her loss occurred.

FOURTEENTH: Your petitioner seeks a review of the ruling of the Circuit Court of Appeals as to the award for value of the *Proteus* and thereafter the additional relief above outlined.

II.

REASONS FOR ALLOWANCE OF WRIT.

1. There was not only not any market to establish a "market value" for the *Proteus* at the time of her loss, August 19, 1918, but there was also not any definite standard of reconstruction cost, since it was impossible to reconstruct the vessel at that time, at any cost. II. Fol. 2163. Evidence of the contemporaneous cost of construction is at best speculative, therefore, as applied to the *Proteus*. The rule applied by the Circuit Court of Appeals, which accepted an "estimated" cost of replacement as a basic figure, and reduced it, by an almost equally speculative figure to represent "depreciation" for age, could not but result in a highly fictitious valuation, excluding, as it did, other important factors bearing on the worth of the *Proteus* to her owner. The fairer and more reasonable rule in ascertaining the damages under these circumstances is that applied by the

Commissioner, and by the District Court, namely, that all relevant factors should be considered, and that the one narrow method, which the Circuit Court of Appeals subsequently adopted, should not control exclusively.

The Circuit Court of Appeals erred in arriving at a result by application of an arbitrary formula, based on two uncertain factors, to the exclusion of other material factors of controlling relevance.

2. The questions involved in this case or questions analogous thereto, have been before the Circuit Courts of Appeals for the First, Second, Fourth, Fifth and Ninth Circuits, and the decisions of those courts are not harmonious, as is indicated by the following cases:

The H. F. Dimock (C. C. A. 1st Cir., 1896) 77 Fed. Rep. 226;

The Cushing (C. C. A. 2nd Cir.) decided July 16, 1923;

La Normandie (C. C. A. 2nd Cir., 1893) 58 Fed. Rep. 427;

Whitehurst v. *United States* (C. C. A. 4th Cir., 1921), 272 Fed. Rep. 46;

The J. E. Trudeau (C. C. A. 5th Cir., 1893) 54 Fed. Rep. 907;

The Samson (C. C. A. 9th Cir., 1914) 217 Fed. Rep. 344; 208 Fed. Rep. 347.

The Circuit Court of Appeals for the First Circuit, in the case of *The H. F. Dimock, supra,* discredited the exclusive application of the rule of cost of reproduction, p. 234, and laid down the rule that all relevant facts should be considered, p. 236. The Circuit Court of Appeals for the Second Circuit, in the case of *La Norman-*

die, supra, although holding that "there is no hard and fast rule", proceeded on the foregoing principles as applied in the First Circuit; whereas in the instant case of *The Cushing,* the same court adopted the narrower ruling of reproduction cost. The Circuit Court of Appeals for the Fourth Circuit, in *Whitehurst* v. *United States, supra,* used the original cost of the commodity as the basis of the measure of damage. The Circuit Court of Appeals for the Fifth Circuit, in the case of *The J. E. Trudeau, supra,* while apparently favoring the reproduction theory, with a fixed proportion of one-third off new for old, accepted the ruling of the District Court based on original cost, with an annual depreciation for age. P. 912. The Circuit Court of Appeals for the Ninth Circuit, in the case of *The Samson, supra,* applied the rule of original cost less depreciation for age; and although there was evidence that reproduction cost had increased materially between the time of construction and the loss of the vessel, 208 Fed. 347, p. 352, the reproduction rule later adopted in the instant case in the Second Circuit was disregarded in the Ninth Circuit.

2. It is of great importance that a uniform and reasonable rule should be laid down by this Honorable Court, for ascertainment of the values of ships which have become total losses, and as to which the ordinary rule of market value is not applicable. The necessity for uniformity and agreement in the principles governing these valuations is peculiarly urgent at the present time, because of conditions arising from the requisitioning of substantially all American vessels during the period of the recent war, and extending considerably beyond the cessation of hostilities during which period a large num-

ber of ship casualties have occurred entailing adjudications of values, and affecting not only private shipping interests, by also governmental departments. It is of vital importance that there should be controlling principles for general and harmonious application by the several courts which are now dealing and will hereafter deal with these questions, and similar questions in analagous matters.

3. The peculiar circumstances which have arisen during the pendency of this litigation, as recited in the Eleventh, Twelfth and Thirteenth Articles above, justify a further inquiry into the facts, to determine their legal effect, and their bearing on the measure of damage for which your petitioner may be liable, as to which there is not any relief available except as may be obtained under process of review by this Honorable Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to the Supreme Court for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in the said Circuit Court of Appeals in the said consolidated cause entitled "In the Matter of the Petition of Standard Oil Company of New Jersey, as owner of the Steamship *Cushing*, for Limitation of Liability"; and that the said decree of the Circuit Court of Appeals in the said case may be reversed by this Honorable Court, and that your petitioner may have such other and further relief or rem-

edy in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray, etc.

STANDARD OIL COMPANY (N. J.),
By C. T. WHITE,
Secretary.

W. H. MCGRANN,
JOHN M. WOOLSEY,
Counsel for Petitioner.

STATE OF NEW YORK, }
County of New York, } ss.:

C. T. WHITE, being duly sworn, says:

I am the Secretary of the Standard Oil Company (N. J.), a corporation organized under the laws of the State of New Jersey, the petitioner herein; and I have knowledge of this litigation. The foregoing petition, and the matters therein set forth are true, to the best of my knowledge, information and belief.

C. T. WHITE.

Sworn to before me this }
16th day of October, 1923. }

E. A. MANNING,
Notary Public.

[SEAL]

We hereby certify that we have examined the foregoing petition, that in our opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

W. H. MCGRANN,
JOHN M. WOOLSEY,
Counsel.

SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY OF NEW JERSEY, Petitioner, vs. SOUTHERN PACIFIC COMPANY, and JAMES C. DAVIS, Director General of Railroads, Respondents.	October Term, 1923. No.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT.

This is an application for a writ of certiorari for a review of the decree of the United States Circuit Court of Appeals for the Second Circuit, modifying, and affirming as modified, a decree of the United States District Court for the Southern District of New York.

The material facts and the questions involved are set forth in the foregoing petition.

The question for decision is: What rule of law is to be applied in ascertaining the value of a vessel totally lost where the vessel could not have been sold at the time of loss and no market value could be established, and, also, where the vessel was not replaced and could not

have been replaced at the time by reconstruction, so that a definite reconstruction value could not be established?

The contention of the Petitioner is that the rule of measure of damages under these circumstances should not be that as applied by the Circuit Court of Appeals for the Second Circuit, namely, by accepting an estimated reconstruction cost, and making a reduction therefrom for depreciation, "new for old," which, it is submitted, is not a fair measure of the damage, and is contrary to the decisions in other circuits and to the weight of authority on the subject; but, that the more reasonable and more flexible rule adopted by the Commissioner and the District Court is the proper rule of law applicable, namely, that no one arbitrary method in reaching a figure by mathematical calculation can be used, but that "all relevant facts should be considered" in arriving at the sum to compensate for the loss. Vol. II, fols. 2542, 2543, 2567.

Apart from the question involved in the rule of damage, the circumstances which has been alleged in the eleventh, twelfth and thirteenth articles of the foregoing petition, may be of controlling importance in its legal effect, and warrants an opportunity of proof and a consideration of its relevancy to the matter of award for value of the Proteus.

FIRST POINT.

THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT ERRONEOUSLY APPLIED AN ARBITRARY AND INFLEXIBLE RULE OF DAMAGE, NOT JUSTIFIED BY THE FACTS, AND CONTRARY TO THE RULINGS OF OTHER CIRCUITS, AS WELL AS TO THE WEIGHT OF THE AUTHORITIES.

As has been stated in the foregoing petition, the award of the Commissioner, after he had seen and heard numerous witnesses in a protracted hearing of several months, was fixed in the sum of $750,000 as "sufficient to compensate the claimant for its loss." Vol. II, fol. 2543. That amount was confirmed by Circuit Judge Mack, sitting in the District Court, in his analytical and well-considered opinion of October 17, 1922. Vol. II, pp. 854-862. The Circuit Court of Appeals increased that figure to $1,225,000 by applying its "reproduction" method, which meant the addition of $475,000 to the original awards. This wide difference in the two amounts is sufficient to challenge attention at once, indicating forcefully that one or the other figure is grossly wrong, and that the principles of law applied are commensurately divergent.

The Circuit Court of Appeals stated:

> "Assuming, as claimed, there was no market value in August, 1918, because such steamships could not be purchased because none were on the market or because it was difficult, if not impossible, to obtain a ship builder to construct one, then these special circumstances invoke the rule of damages of cost of production less depreciation." (The word "production" as here used meant "repro-

> duction," that is, building anew, as is shown by the succeeding text of the opinion.)

The Court then, following its conclusion of law as to the rule of damages applicable, adopted the exact figure claimed by the respondents, Southern Pacific Company, namely, $1,225,000, which was the result of a mathematical calculation made by one of its witnesses, who, in his own words, explained the calculation as follows:

> "Q. Mr. Martin, how did you get at this value of $1,225,000? What does it represent? A. *There being no sales to guide me,* I took the *estimated* cost of the reproducing a vessel of the same size and description of the *Proteus* in August, 1918; and the *estimated* cost was $1,750,000. From that cost I deducted two and one-half per cent for eighteen years' depreciation, which is $525,000, leaving a value of $1,225,000." Vol. II, fol. 1609.

The fallacy of this method as applied to the instant case is that the basic figure representing cost of reproduction was as uncertain as would have been an application of a "market value", for the reason that it would have been impossible to build a new *Proteus* at that time, owing to the governmental control of the constructing shipyards, which could not accept and execute private orders. Vol. II, fols. 2161, 2163, 2500, 2501. The inability to establish a market value was due to the same cause, that is, the requisitioning of all American vessels over 2500 tons, and the forbidding of sales of American vessels by the Government. Vol. II, fols. 1603, 1604, 1609, 2561. Since the ordinary rule of market value could not be applied, owing to the fact that there was not a free mar-

ket within the meaning of that rule, for the same reason a "reconstruction value" could also not be properly applied. As the Commissioner stated, the adoption of the estimated reproduction value as a controlling basis of value, would be tantamount to adopting "a purely artificial standard". Vol. II, fol. 2501. The District Court took substantially the same view. Vol. II, fol. 2571.

The case of the *Mersey Docks and Harbor Board and the Lords Commissioners of the Admiralty,* 3 K. B. 1920, and the remarks of Lord Reading from page 223 of the opinion, were quoted by the Circuit Court of Appeals, in support of the application of a reproduction cost; but, the facts of that case show that the Harbor Board actually paid out a sum of money to replace another barge which had been requisitioned while building. There was thus incurred a definite money loss directly due to the requisitioning. That was not the situation here, as there was not any effort made to reproduce the *Proteus,* nor to replace her by purchase of another vessel later. The Commissioner had considered the Mersey Docks case and had distinguished it. Vol. II, fols. 2537-2540.

One of the essential elements in ascertaining the real value of the *Proteus* at the time of her loss was either disregarded or not given due weight by the Circuit Court of Appeals, in applying the inflexible reproduction rule, that element being the requisition status of the *Proteus* which clearly affected her value. There was unrefuted evidence that a requisitioned vessel had less value than a "free" vessel. Vol. II, fol. 1921. The owner of the *Proteus* was prevented from selling or otherwise disposing of the *Proteus* by reason of the requisition, and could not have prof-

ited by such temporarily increased values as may have existed.

In the case of *The Kia Ora* (D. C., E. D. Virginia, September, 1917), 246 Fed. Rep. 143, District Judge Waddill (now Circuit Judge of the Circuit Court of Appeals for the Fourth Circuit), recognized this fact and its bearing on the question of value. The Judge there stated, at page 144:

> "Her value at the time of stranding, under requisition for war purposes, was $1,772,620; if not under requisition, at existing rates, her value would be about $3,000,000."

Also, further, at page 147:

> "The ship's value is variously estimated from $1,772,620 to $3,000,000; the former figure being her estimated worth at this time under requisition, and the latter what she would now be worth, if free from governmental control. For the purpose of reaching a just award, the Court thinks the value may be treated as of the first amount, viz. $1,772,620, though there is much force in libellant's contention as respects its greater value."

It may be noted that the *Kia Ora* was a large British steamship in trans-Atlantic and Australian trade, having a cargo capacity of 11,800 tons, and built in 1907. P. 144.

The Court by adopting the requisition value thus reduced the normal value by more than forty per cent.

In the English case of *Harries* v. *Shipping Comptroller*, 14 Asp. M. C. 320 (May, 1918), the "requistion value" of the vessel was placed at £28,500, and the value free from requisition at £44,300. It was there held that the lower value would be the measure of the damage in total loss by enemy action.

The same principle of value was applied in *Shipping Comptroller* vs. *The Lloyd Royal Belge*, 1 Lloyd's List Reports, 231, 389, King's Bench Division, Commercial Court, November, 1919.

These decisions are pertinent as it is well settled that in matters of commercial law our decisions should conform to the English decisions in the absence of some rule of public policy which precludes our courts from following the English decisions. This was pointed out in the case of *The Eliza Lines*, 199 U. S. 119 at 128, in the opinion of Mr. Justice Holmes.

This element of value of the *Proteus* is one of the "relevant facts" which the Commissioner and the District Court properly considered. Vol. II, fols. 2501-2504, 2565, 2566; but, its effect was clearly without force in the application of the inflexible "reproduction rule" adopted by the Circuit Court of Appeals.

There were a number of such important elements as the preceding, which it is submitted bore materially on the value of the *Proteus*, and as to which evidence had been adduced. Under the rigid rule of damage applied by the Circuit Court of Appeals, these various elements were not taken into consideration, which accounts for the divergency between the extremely high value placed by the Circuit Court of Appeals, and the reasonable yet commensurate value placed by the District Court and the Commissioner. Among these relevant factors may be mentioned:

1. The abnormal, excessive, and transitory values affecting cost of contemporaneous ship construction.

The "reproduction" cost of a new vessel like the *Proteus* as claimed was a *maximum* figure based purely on estimates, namely, $1,750,000. That figure was the

basis of the award of the Circuit Court of Appeals. The District Court properly held that such a valuation would not represent the "fair value" of the *Proteus*. Vol. II, fol. 2574. The District Court cited, as limiting the reproduction theory in important respects, the cases of: *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 171, 172; and *Minnesota Rate Cases*, 230 U. S. 352, 452; and concluded that: "* * * reproduction cost, no more than market value, should necessarily be regarded as the ultimate criterion of fair value". Vol. II, fols. 2570-2571.

In the *Minnesota Rate Cases*, 230 U. S. 352, at page 434, the Supreme Court stated:

> "The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

Also, this Court intimated that a highly transitory market value is not a real test of value, in *United States* vs. *Sage*, 239 U. S. 57, p. 61. To the same effect are: *Lawrence* vs. *Boston*, 119 Mass. 126, 128; *Brown* vs. *Calumet River Railway Company*, 125 Ill. 600, p. 606; *Lanquist* vs. *City of Chicago*, 200 Ill. 69, p. 73. What has been said in respect of "market value" in those cases applies under the circumstances here with equal force to "reproduction cost".

In the case of *Galveston Electric Company* vs. *City of Galveston*, 272 Fed. 147, 157, which was later reviewed by this Honorable Court (April 10, 1922), 258 U. S. 388, the application of transitory values to the determination of the real value of property was not favored. Vol. II, fols. 2570, 2575-2576.

2. The comparatively low first cost of the PROTEUS.

The *Proteus* had cost to build in 1900 the sum of $540,-440, Vol. II, fol. 2178 (not, as assumed by the Circuit Court of Appeals, the sum of $557,600). She had been re-boilered and repaired during 1909, at a cost of $90,000. Vol. II, fol. 1698. (If her boilers lasted only nine years in the first part of her life, she must have been nearly due for re-boilering at the time of her loss in 1918.) The amount invested by her owners in the *Proteus* was therefore about $630,000. She had been employed presumably in earning profits for eighteen years, as returns on the original investment. The award of the Circuit Court of Appeals ($1,225,000.) thus allows the full amount of original investment, plus the large sum of $575,000 representing nearly one hundred per cent additional profit on the investment, without considering the previous profits, and decrease in future expectancy due to age of the vessel. That high valuation was largely due to the somewhat harsh and rigid rule applied, based on "reproduction cost", which the District Court had properly discontinued somewhat, under the authorities previously cited.

If the rule adopted by the Circuit Court of Appeals for the Ninth Circuit, in the case of *The Samson*, 208 Fed. Rep. 347, and (1914) 217 Fed. Rep. 344, of *original* cost less depreciation for age, should be applied here, the value of the *Proteus* would have been found to be less than half of the amount fixed by the Circuit Court of Appeals for the Second Circuit.

3. The considerable age of eighteen years and its obsolescent effect on the value of the PROTEUS.

There was evidence that ship design had improved during the eighteen years' life of the *Proteus,* so that that vessel may be deemed to have been obsolete in some respects. Vol. II, fol. 1745. The so-called "percentage of depreciation" was fixed by the Circuit Court of Appeals in the most favorable terms for the owner, however, without regard to any question of obsoleteness. Indeed, the depreciation used by the owning company was considerably more than that applied by the Court. Vol. II, fol. 2261-2262. The rate of depreciation to be applied on the reproduction theory received consideration of both the Commissioner and the District Court, and the former pointed out the fallacy of such a reduced depreciation as the Circuit Court of Appeals afterwards applied. Vol. II, fol. 2535. The rate of "depreciation" is necessarily a factor in accounting for age, that is, substituting "new for old"; but, it seems that the elements governing the proper rate to be used were not fully considered by the Circuit Court of Appeals, in adopting its most favorable rate for producing high valuation. That factor in the value is necessarily dependent on age, and although the owner of the *Proteus* may have anticipated the maximum life of forty years of the vessel, nevertheless, unquestionably her value in the market would have been very much affected by her age and long use of eighteen years. The annual depreciation percentage finally applied by the Circuit Court of Appeals was a *minimum,* and accordingly favorable to the respondent, Southern Pacific Company. *San Francisco and Portland Steam-*

ship Company vs. *Scott*, 253 Fed. 854; *United States* vs. *Standard Oil Company*, 258 Fed. 696; *The Harmonides*, 1903, Prob. Div. 1. The Courts, in these cases, used from five to six per cent per annum.

4. The special type and special use of the PROTEUS *as a coastwise combined passenger and cargo vessel, and her comparative unfitness for trans-Atlantic cargo carrying, or for general service.*

Peculiarities of construction of the *Proteus* were described by one of the witnesses who was familiar with the vessel at the time she was being built; and it was demonstrated that her efficiency for cargo carriage was very much less than the ordinary type of cargo carrier of the same tonnage. Vol. II, fols. 2055, 2082-2085. That was an element which must have clearly affected the marketability of the *Proteus*, if she could have been sold, and consequently her value at the particular time of her loss. The reproduction rule did not take into consideration this important element of value.

5. The value placed on the PROTEUS *by Southern Pacific Company.*

The Southern Pacific Company was carrying the steamship *Proteus* on its books at a value of $224,986.49, as of August 19, 1918, the date of her loss. Vol. II, fol. 2261. It seems that the practice of the company was to depreciate the values of all their vessels by seventy-five per cent of cost during the twenty years of use. It may be that the value thus stated did not adequately represent the true value; but, it at least was an indication of the owner's view of the vessel value as a part of its cap-

italized property. It seems somewhat inconsistent that with a considered "book value" in the amount stated, the owner should now seek to recover nearly six-fold that value.

6. The insured value of the PROTEUS.

There were enlightening developments in respect of valuation placed on *Comus*, an exact duplicate of the *Proteus*. It was found that the *Comus* had been insured for $690,000, which included also "disbursements", an additional amount to the insurance for hull and machinery. An important feature of this "insured value" as appears in the record, is that the Advisory Board of the War Risk Insurance Bureau had formulated a scale of values of vessels for various purposes, according to which the maximum value of a class of the *Proteus* type would have been about $607,000, namely, $175 per deadweight tonnage less ten per cent for non-classification. Vol. II, fols. 2310, 2312-2319, 2340, 2345-2346, 2357, 2450, 2454. That scale had been formulated during the same month in which the *Proteus* was lost, and as the members of the Board were well-known experts on vessels' values, the schedule thus formulated should have been at least persuasive evidence of the "going values".

In the case of *The Iron Master*, Swab. 443, Dr. Lushington stated as one of the items to be considered in valuing vessels as "the sum at which she was insured"; and that rule had been cited with approval in *The Colorado* Brown Adm., 411, Fed. Cas. No. 3,029, which case was affirmed by this Court, in *The Colorado*, 91 U. S. 692. The English case of *The Harmonides*, (1903) Prob. Div. 1, also approved the rule.

Such evidence was not given any weight, however, in applying the "reproduction" rule here.

7. Value as a going concern at the time of her loss.

It has been held that one element of valuation is "What is her value to the owner as a going concern at the time she was lost." *The Harmonides*, 1903 Prob. Div. 1; Marsden on Collisions at Sea, 6th Edition, p. 119. Factors bearing on this element of value would undoubtedly be the use to which the owner could place the vessel at the time of loss, the profits accruing from that use, the amount of money invested in the venture, and the anticipated profits for continuance of use. A consideration of value from this viewpoint would naturally lead to the effect of the requisitioning, which has been previously discussed, and the continuance of the requisition status, which, as has been pointed out, would have remained in force until March 1, 1920.

Perhaps a tangible result could not be adduced from this element of value alone, but it nevertheless should have a bearing on the final amount to represent the loss. Vol. II, fols. 2502-2504.

It is submitted that the foregoing factors are important elements among others, in arriving at a fair value, under the circumstances here, and that the Circuit Court of Appeals erred in not giving due weight to these elements of value, and in substantially excluding them by its narrower rule based on estimated reproduction cost. A number of authorities support the consideration of such factors as have been enumerated. This Supreme Court, in *The Colorado*, 91 U. S. 692, *supra*, by affirming the lower court's decision in that case (decided

by Judge Longyear), at least tacitly approved the rule there followed, which was the broad rule originally expounded by Dr. Lushington in *The Iron Master*, Swab. 443, previously quoted. This Honorable Court also, in the *Minnesota Rate Cases*, 230 U. S. 433, approved the same rule now contended for, to the effect that "all relevant facts" must be taken into consideration in arriving at property values. The conclusions of District Judge Brown in the early case of *The Utopia*, 16 Fed. Rep. 507, p. 510, cited by the Commissioner, are to the same effect; also, *Leonard* v. *Whitwill*, 19 Fed. Rep. 547, p. 548. Circuit Judge Mack, sitting in the District Court for the Southern District of New York, ruled similarly, in the instant case, stating:

> "If evidence is adduced, indicating that the market price is not fair under the circumstances, then all other relevant facts should likewise be considered in determining fair value, unless indeed some positive form for ascertaining value is established by legislation. Cf. the rate regulation cases; Minnesota rate cases, 230 U. S. 352, 434.
>
> * * * * *
>
> "All the relevant facts should be considered."

Vol. II, fols. 2567-2568; *The Cushing-The Proteus*, 285 Fed. 617, pp. 619-620.

That broader and more flexible rule was applied by the Circuit Court of Appeals for the First Circuit, in *The H. F. Dimock*, 77 Fed. Rep. 226, p. 236; and, also, by the then Circuit Court of Appeals for the Second Circuit, in the earlier case of *La Normandie* (1893), 58 Fed. Rep. 427. *Ante*, Petition, pages 9-10.

Circuit Judge Putnam, in *The H. F. Dimock, supra*, at p. 235, after quoting from Williams and Bruce's Admiralty Practice (second edition), p. 97, to the effect

that "The Court will endeavor to arrive at the real extent of the loss sustained by calling to its aid every circumstance which may assist it to form a correct estimate", further stated that "All the elements to which we have referred as admissible concerning the valuation of articles" s uld be considered. P. 236.

Similarly, in the case of *La Normandie, supra,* the broad rule of taking into account all relevant factors was followed.

In the English case of *Harries* vs. *Shipping Comptroller,* 23 Comp. Cas. 308, 19 Asp. M. C. 320 (1918), the Court stated, at p. 310:

> "To ascertain the value it was necessary to take into consideration all the facts, and one of the most material facts was the fact that the ship at the time of the loss was under requisition."

See also *The Harmonides,* 1903, Prob. Div. 1, at p. 5; *Ante,* p. 19, as to force of English decisions. *The Eliza Lines,* 179 U. S. 119, p. 128.

On the other hand, if the rule which was applied by the District Court in the instant case, and which was invoked in the case of *The H. F. Dimock, supra,* in the First Circuit, should be deemed to be too flexible for application to the present case, which the petitioner does not concede, then, it is submitted, the fairer rule would be that as applied squarely by the Ninth Circuit in the case of the Samson, 217 Fed. Rep. 344, which Court looked only to the first cost of the vessel, and not to a fictitious "reproduction" cost.

In any event, the decisions on this important point as cited and stated in the foregoing Petition, pp. 9-10, show marked conflicts in the rulings and principles applied, which should be rendered uniform by a review of the instant case by this Honorable Court.

The foregoing factors have been discussed to illustrate and emphasize wide differences which must result from applying the broad rule adopted by the District Court, on the one hand, and the narrow rule used of the Circuit Court of Appeals, on the other hand.

The former has the support of a preponderance of the authorities, it is believed.

But, apart from the preferential merits of the two rules, conflicts as to the controlling legal principles applicable clearly exist among the several Circuit Courts of Appeals, as appears from the cases cited and distinguished in the foregoing petition, *ante*, pages 9 and 10. The cases there cited may be grouped by rules as follows:

(a) The broad rule of considering all relevant facts:

The H. F. Dimock, (C. C. A., 1st Circ., 1896), 77 Fed. Rep. 226; *La Normandie*, (C. C. A., 2d Circ., 1893), 58 Fed. Rep. 427.

(b) The first (original) cost rule, less depreciation for age:

The Samson (C. C. A., 9th Circ., 1914), 217 Fed. Rep. 347; *The J. E. Trudeau*, (C. C. A., 5th Circ., 1893), 54 Fed. Rep. 907; *Whitehurst* v. *United States*, (C C. A., 4th Circ., 1821), 272 Fed. Rep. 46.

(c) The rule of reproduction cost, less depreciation for age:

The Cushing, (C. C. A., 2d Circ., July 16, 1923. (Instant case).

It is submitted that the circumstances set forth above fully warrant the review of this case by this Honorable Court.

SECOND POINT.

THE SOUTHERN PACIFIC COMPANY, AS OWNER OF THE STEAMSHIP *Proteus*, IS DEBARRED FROM RECOVERING THE VALUE OF THE *Proteus* FROM THE PETITIONER, STANDARD OIL COMPANY (NEW JERSEY), IF THE SOUTHERN PACIFIC COMPANY HAS SETTLED ITS CLAIM FOR LOSS OF THE *Proteus* WITH THE DIRECTOR GENERAL OF RAILROADS, RAILROAD ADMINISTRATION, SINCE THE LATTER, AND STANDARD OIL COMPANY (NEW JERSEY) HAVE BEEN FOUND TO BE JOINT TORT FEASORS CAUSING THE LOSS.

The special circumstance which materially alters the original aspect of this litigation has been alleged in the Eleventh, Twelfth and Thirteenth Articles of the Petition, *ante*, pages 5, 6 and 7.

The *Proteus*, while being operated and navigated solely by the Director General of Railroads, and his servants, Vol. I, fols. 102 to 107; and the *Cushing*, operated and navigated by the Standard Oil Company, (New Jersey), came into collision, resulting in total loss of the *Proteus*. The collision and loss of the *Proteus* was found to have been caused by joint faults and acts of negligence on the part of the navigators of the *Proteus* and the *Cushing*. The Southern Pacific Company was not privy to the loss, and that fact having been established, the right to limit liability under the statutes was granted.

Indeed, there was not and is not any liability attachable to the Southern Pacific Company, which is the innocent injured party seeking only to recover for the value of the *Proteus*.

But the Director General of Railroads is liable, as the demise charterer in sole possession and control of the *Proteus,* and whose servants negligently contributed to the loss. *The Barnstable,* 181 U. S. 464.

Also, the Petitioner, Standard Oil Company (New Jersey) has been found to be a joint tort feasor with the Director General of Railroads, and jointly liable for the loss of the *Proteus.*

That definite position of each of the three parties forms the true legal relationship, and survives the somewhat incongruous situation brought about by the form of procedure followed to secure the benefit of the limitation of liability statutes.

If, then, as the Petitioner has unquestionably authoritative grounds for belief, the Southern Pacific Company has settled its claim for loss of the *Proteus* with the Railroad Administration (Director General of Railroads), i. e., one of the joint tort-feasors, the claim which it may have had for the same loss against the other tort feasor, Standard Oil Company (New Jersey) has thereby been extinguished. *Atlantic & Pacific RR. Co.* vs. *Laid,* 164 U. S. 393, 400; *Sessions* vs. *Johnson,* 95 U. S. 347; *The St. Cuthbert* (D. C., D. N. J., 1907), 157 Fed. Rep. 799, p. 800; *Miller* vs. *Tobacco Co.,* 7 Fed. Rep. 91; *Re Emma Silver Mining Co.,* 7 Fed. Rep. 401; *Bailey* vs. *Lundberg,* 49 Fed. Rep. 583; *Williford* vs. *Kansas City R. R.,* 154 Fed. Rep. 514.

It is a well settled rule of law that the release of a cause of action as against one of two or more joint tort feasors operates as a release of all, upon the theory that when one has received full compensation for a wrong, *no matter from which wrongdoer or from what source,* the law will not permit him to recover further damages. *Lovejoy* vs. *Murray,* 3 Wall. 17, 18; *O'Shea*

vs. *N. Y. C. & St. L. R. R. Co.*, 105 Fed. Rep. 559, 561 (Circuit Court of Appeals, 7th Circuit); *Hatzel* vs. *Moore*, 120 Fed. Rep. 1015, *Spurr* vs. *North Hudson Co. R. R. Co.*, 56 N. J. Law, 346; *American & English Encyclopedia of Law*, Second Edition, Volume 24, pp. 306, 307 and cases cited therein.

The better doctrine seems to be that even if in the release it is expressly stated that a claim is against one only of the tort feasors, nevertheless it operates as a matter of law to discharge all of the others, and the words of limitation are considered to be of no force as repugnant to the legal effect and operation of the instrument. *O'Shea* vs. *N. Y. C. & St. L. R. R. Co.*, 105 Fed. Rep. 559, 561; *Gunther* vs. *Lee*, 45 Md. 60; *Re Long* vs. *Curtis*, 35 Hun, 94; *Seither* vs. *Traction Co.*, 195 P. A. State, 397; 17 Atlantic 338, *Williams* vs. *Lebar*, 141 Pa. State 151.

Many courts go even further and state that if payment is made by one not liable and a release under seal is given, an action cannot be maintained against anyone who may be liable. This rule has been adopted in a number of states, although there are authorities against it. In support of the rule see *American English Encyclopedia of Law*, Second Edition, Volume 24, p. 308; *Leddy* vs. *Barney*, 139 Mass. 394; *Tompkins* vs. *Clay*, St. R. R. Co., 66 California, 166; *Denver R. R. Co.* vs. *Sullivan*, 21 *Colorado*, 302; Hartigan *vs. Dickson*, 81 Minn. 284.

As has been pointed out in the Petition, *Ante* page 7, the only procedure now open to the Petitioner to establish a right of relief under the condition now existing is through process obtainable only on a review of this cause by *certiorari.*

LAST POINT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED, NOT ONLY BECAUSE OF THE ERRONEOUS AND CONFLICTING RULING ON THE VALUE OF THE PROTEUS, BUT ALSO BECAUSE OF THE SPECIAL CIRCUMSTANCE RELATED HEREIN WHICH WARRANTS TAKING OF PROOF AND CONSIDERATION AS TO ITS LEGAL EFFECT.

New York, October, 1923.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

STANDARD OIL COMPANY (New Jersey), *Petitioner,* *against* SOUTHERN PACIFIC COMPANY, AND JAMES C. DAVIS, Director General of Railroads, *Respondents.*	OCTOBER TERM 1923 No. 607

Sirs:

PLEASE TAKE NOTICE that a motion for an order permitting the taking of new evidence in this Court before a Commissioner will be submitted to the Supreme Court of the United States at the opening of Court on the 28th day of April, 1924, or so soon thereafter as counsel can be heard.

Yours, etc.,

WILLIAM H. MCGRANN,
JOHN M. WOOLSEY,
Counsel for Petitioner.

Dated New York, April 14, 1924.

To:

MESSRS. BURLINGHAM, VEEDER, MASTEN & FEAREY,
Proctors for Southern Pacific Co., et al.,
Respondents.

SUPREME COURT OF THE UNITED STATES

STANDARD OIL COMPANY (New Jersey), *Petitioner,* *against* THE SOUTHERN PACIFIC COMPANY, AND JAMES C. DAVIS, Director General of Railroads, *Respondents.*	OCTOBER TERM 1923 No. 607

MOTION FOR AN ORDER PERMITTING THE TAKING OF NEW EVIDENCE IN THIS COURT BEFORE A COMMISSIONER.

AND NOW COMES Standard Oil Company (New Jersey) as owner of the steamship *Cushing* petitioner, and moves that this Court grant to the petitioner, either

1. An order (a) giving leave to the petitioner to take additional evidence in this Court, in pursuance of the request heretofore made in the petition for certiorari, granted herein on the 12th day of November, 1923, and (b) appointing a commissioner with leave to sit in Washington and/or New York to take such evidence orally herein and to report it duly certified to this Court to be printed as a part of the Record herein, or

2. Such other order and relief as the justice of the cause may require.

WILLIAM H. McGRANN,
JOHN M. WOOLSEY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

STANDARD OIL COMPANY (New Jersey),
Petitioner,

against

THE SOUTHERN PACIFIC COMPANY, AND JAMES C. DAVIS, Director General of Railroads,
Respondents.

Affidavit in Support of Motion for Leave to Take New Evidence in this Court.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

WILLIAM H. MCGRANN, being duly sworn, says:

I. I am of counsel for the petitioner herein.

II. In the petition for certiorari granted herein on the 12th day of November, 1923, the situation by reason of which this motion to take new proofs in this Court is made, was fully set forth in paragraphs 11th, 12th, 13th and 14th of the petition, and in the 3rd paragraph of the statement of reasons why the writ should be allowed.

III. The facts of the case were set forth in the petition as follows:

On December 28, 1917, pursuant to Act of Congress of August 26, 1916, Chap. 418, Par. I, 39 Stat. 645, and

under the Proclamation of the President of December 26, 1917, the steamship *Proteus,* owned by the Southern Pacific Company, was taken into the possession and control of the Director General of Railroads, and was thereafter manned, operated, and navigated at the expense of the Director General of Railroads, under his sole control, including the time of the collision hereinafter mentioned. Vol. I, fols. 102-107. The Director General of Railroads was in legal effect the demise charterer in possession of the *Proteus,* which, unless lost, would have continued under the sole control of the Railroad Administration until March 1, 1920; Transportation Act of 1920, Section 200 (a).

On or about August 19, 1918, while the said steamship *Proteus* was in the possession and control of the Director General of Railroads, and manned by its servants, as aforesaid, a collision occurred between the said steamship *Cushing,* and the *Proteus,* with the result that the steamship *Proteus* and her cargo were totally lost.

After the accident, petitions for limitation of liability were filed on behalf of both vessels. The Director General of Railroads as the demise charterer, and as co-petitioner with the Southern Pacific Company, claimed the benefits of its limitations of liability provided by Sections 4283-4286 of the Revised Statutes being represented on the record by Burlingham, Veeder, Masten, and Fearey; and, Roscoe H. Hupper, Vol. I, fol. 127. Although the Southern Pacific Company was owner of the *Proteus* and a co-petitioner in these proceedings, the

real party in interest was the Railroad Administration, because the Railroad Administration had sole possession and control of the steamship *Proteus* as aforesaid and of the two would have been the only party which could properly have been held liable for any damage caused by her loss.

The merits of the collision case were tried out in the United States District Court for the Southern District of New York, and a decision holding both vessels at fault was rendered, with reference to a commissioner to ascertain the damages. Vol. I, pages 509-522; *The Cushing, The Proteus,* 266, Fed. Rep. 570.

The damages were assessed, after extensive proofs before an experienced Commissioner, who heard all the witnesses. The Commissioner awarded "the sum of $750,000, with interest thereon from August 19, 1918, the date of the loss", as the value of the *Proteus,* after considering all relevant facts bearing on the question of "value". Vol. II, fol. 2544.

The findings of the Commissioner as to "the value" of the *Proteus* were reviewed on exceptions by the District Court, Circuit Judge Mack sitting; and, after a well-considered opinion, the exceptions were overruled and the Commissioner's findings confirmed. Vol. II, pages 854-862; *The Cushing,* 285 Fed. Rep. 617. Circuit Judge Mack expressly confirmed and adopted the rule as applied by the Commissioner that "all the relevant facts should be considered" in arriving at the fair recompense to the owner. Vol. II, fol. 2568.

The causes under the limitation proceedings were consolidated by order of the United States District Court of November 6, 1922, Vol. II, pp. 863-864; and final decree was entered in the United States District Court on November 28, 1922. Vol. II, fol. 2604.

The Standard Oil Company (New Jersey) appealed from the final decree on the merits on December 27, 1922, and the Southern Pacific Company appealed from the decree in so far as the value of the *Proteus* was fixed therein, on January 27, 1923. The Director General of Railroads, the real party in interest, did not take any appeal.

The appeals came on to be heard before the Circuit Court of Appeals for the Second Circuit, and that Court, in its opinion handed down July 16, 1923, affirmed the decree of the District Court on the merits, but modified the award for the item of damage representing the value of the steamship *Proteus*, by allowing the sum of $1,225,000 for that item, as against $750,000, which had been awarded by the Commissioner and affirmed by the District Court; that is, the value of the *Proteus* was increased by $475,000, which is an addition of 63⅓% of the original award. The order of that Court to which this petition for certiorari is directed was entered in the Circuit Court of Appeals on July 23, 1923.

The high figure which the Circuit Court of Appeals awarded, viz. $1,225,000, was obtained by taking $1,750,000 as an "estimated cost" of reconstructing the

Proteus anew, and deducting from it the sum of $525,000, as depreciation at two and one-half per cent per year for the eighteen years of age of the vessel. Vol. II, fols. 1607-1610.

IV. After a Statement of the case substantially the same as the preceding, the facts at the basis of the present motion and the intention of the petitioner to make this motion were fully set forth in the application for certiorari, which this Court granted on the 12th day of November, 1923, as follows:

> "ELEVENTH: At the time that the collision occurred, the situation was that the Southern Pacific Company as the innocent owner of the *Proteus*, had a claim against the Director General of Railroads for her value at the time of her loss.
>
> "That loss has been held to be due in part to negligence of the servants of the Director General of Railroads who were operating her at the time of the collision.
>
> "The Southern Pacific Company at the time of the loss had also a claim against the owners of the *Cushing* for the same tort.
>
> "Consequently, the apparent line-up of the parties with the Director General of Railroads and the Southern Pacific Company on the one side and the Standard Oil Company on the other side, does not represent a true analysis of the legal relationships.
>
> "The real legal relationship is that the Southern Pacific Company had a claim against two parties—the Standard Oil Company (New Jersey) and the Railroad Administration, who together,

as the decisions have proved, were joint tort feasors causing the loss of the Southern Pacific Company's steamer *Proteus*.

"Since the expiration of the Term of the Circuit Court of Appeals, it has come to the attention of counsel in this case, through proper and reliable sources, that a final settlement had been arrived at between the Railroad Administration and the Southern Pacific Company by which the liability of the Railroad Administration for the loss of the *Proteus* had been finally satisfied and extinguished by a payment, credit, or adjustment on the basis of the value found by the Commissioner and confirmed by the District Court, namely, $750,000. This settlement was made, the petitioner is informed, between the time of the decision of the District Court and that of the Circuit Court of Appeals.

"The situation, therefore, is singular. Because in addition to the ordinary application for a writ of certiorari which is being put forward and had been planned to be put forward by the petitioner, since the decision of the Circuit Court of Appeals for the reasons hereinafter mentioned, a situation exists, it is believed by counsel for the petitioner, in which settlement by the Director General of Railroads with the Southern Pacific Company has extinguished any claim by the Southern Pacific Company against the Standard Oil Company because it is a settled rule of law in admiralty as well as at common law that a settlement with one joint tort feasor of a claim by the damaged party, precludes the continuance of the claim for the same loss by the damaged party against the other tort feasor.

"In any event, the Southern Pacific Company should not be allowed to claim from the petitioner more than it has agreed with its demise charterer, the Railroad Administration, as the value of the *Proteus* and the basis for its damages for the loss of the *Proteus* through that charterer's fault.

"TWELFTH: The term of the Circuit Court of Appeals for the Second Circuit is held annually. The annual term commences by Rule 3 of that Court on the first day of October in each year. Therefore the term at which the decision in the instant case was made,—the October Term, 1922, of the Circuit Court of Appeals for the Second Circuit,—expired on September 30, 1923.

"Owing to the fact that the term of the Circuit Court of Appeals had expired when the facts above adverted to were learned by the counsel for the petitioner, they are not in a position to make any application for relief of any kind in the Circuit Court of Appeals.

"Naturally the facts just noted are not included in the Record on Appeal here and the only method by which the petitioner will be able to receive any relief is to have this Court grant a writ of certiorari to review the question of damages for the reasons hereinafter stated and then to provide for the taking of such evidence or the discovery of such documents as may be necessary to establish the precise facts regarding the settlement referred to, in order that this Court may be in a position to determine what legal results may have flowed therefrom.

"THIRTEENTH: Certainly it is an extraordinary situation where A having a right against B

for the recovery of the value of a vessel sunk by the joint fault of B and C, should agree with B that the value of the vessel is $750,000, and settle accordingly, and then proceed to claim a value of $1,225,000 against C on a claim which must have been extinguished by the act of settlement between A and B.

"The situation is so singular that it is respectfully urged that this Court find some way in which to deal with the whole situation on certiorari and enable the petitioner to escape from the certainty, which unless certiorari is granted, it now faces of having to account for $475,000 more for the loss of the *Proteus* than was agreed on as her value between her owner and her tort feasor charterer by whose contributing wrong her loss occurred.

"FOURTEENTH: Your petitioner seeks a review of the ruling of the Circuit Court of Appeals as to the award for value of the *Proteus* and thereafter the additional relief above outlined."

The petition for certiorari referring to the facts set forth in the previous quotation also stated as one of the grounds why a review in this Court should be granted that

"3. The peculiar circumstances which have arisen during the pendency of this litigation, as recited in the Eleventh, Twelfth and Thirteenth Articles above, justify a further inquiry into the facts, to determine their legal effect, and their bearing on the measure of damage for which your petitioner may be liable, as to which there is not any relief available except as may be obtained under process of review by this Honorable Court."

V. The prayer of the petition was not merely that the case should be taken up by this court in certiorari but that the

> *"petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just."*

It is to secure this additional relief that this motion is made.

VI. It is not possible to print the record in this case until it is determined what the record will contain with regard to the additional matters mentioned in the preceding quotation because it will be necessary to include those matters in the record on which the case is ultimately argued in this Court in order that the petitioner may be able to present its case fully to the Court.

VII. The reason why the petitioner makes this motion for an order for the appointment of a Commissioner to take evidence *orally* and report it duly certified to this Court, to be used as a part of the record herein, is that the petitioner is not in a position to draw up written interrogatories dealing with the matters mentioned in the above quotation from the certiorari, which it wishes to bring out as an addition to the record herein.

The petitioner does not know, and this deponent as its counsel has been unable to find out with definiteness, just what procedure was followed in connection with the

settlement arrived at between the Director General of Railroads and the Southern Pacific Company in respect of the value of the steamship *Proteus*. Until the evidence has been somewhat developed, counsel for the petitioner cannot even be certain just what witnesses will have to be examined. It will of course be necessary to examine the Director General of Railroads and some of his employees, but who those employees are counsel does not know. It will probably be necessary also to examine officers or employees of the Southern Pacific Company at New York, whose identity is not known to the petitioner or this deponent, and which can be discovered only by means of the procedure that would become available before a Commissioner appointed by this Court.

VIII. It is believed that evidence will have to be taken not only in Washington, but also in New York, and in order that the Commissioner's authority for taking the evidence may be sufficiently elastic it is hoped and requested that the Court, if it grants the order requested, will give the Commissioner appointed specific leave to sit and hear evidence in New York as well as in Washington, and will allow the fees and expenses of the Commissioner in connection with this additional evidence to be taxed as part of the costs of the petitioner in this Court if the petitioner shall be finally successful here.

IX. This deponent is aware that the relief now sought may entail a somewhat unique procedure, but the circumstances which have arisen, and as recited in the

foregoing text, are peculiar, and it is believed that relief cannot be adequately supplied except by means of the procedure as requested herein.

Therefore, this deponent prays that the Court in the exercise of its plenary powers will see fit to grant this motion or, if it will not grant the application for the appointment of a Commissioner to take evidence, at least it will make such an order as will enable the petitioner to secure discovery of the information which it regards as necessary to frame interrogatories to get evidence to enable the Court to deal with the curious and unusual situation which has arisen in this case and was outlined in the petition for certiorari as above set forth in this affidavit.

WILLIAM H. MCGRANN

Sworn to before me this
14th day of April, 1924.

JOHN J. HECKMAN
Notary Public
Bronx County Clerk's No. 147
New York County Clerk's No. 821-A
Kings County Clerk's No. 98
Commission Expires March 30, 1925

SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY (New Jersey), *Petitioner,* *against* SOUTHERN PACIFIC COMPANY, and JAMES C. DAVIS, Director General of Railroads, *Respondents.*	OCTOBER TERM, 1923. No. 607.

MEMORANDUM IN SUPPORT OF MOTION FOR ORDER PERMITTING TAKING OF NEW EVIDENCE IN THIS COURT BEFORE A COMMISSION.

I. This is a suit in admiralty. It is in this Court on *certiorari* granted by this Court on November 12, 1923.

II. The motion to take new proof before a Commissioner orally is made for the reason explained in the seventh paragraph of the affidavit of William H. McGrann, verified April 14, 1924. *Motion papers,* page 11.

The reason, as there stated, is that the petitioner is not in a position to draw up written interrogatories dealing with the matters sought to be proved because it does not know, and has not been able to find out, what procedure was followed in connection with the settlement between the Director General of Railroads and the Southern Pacific Company in respect of the value of the steamship *Proteus.*

The circumstances of this settlement, so far as they are within the petitioner's knowledge, are set forth in the fourth paragraph of the affidavit in which a full quotation is made of the statements made in the petition for *certiorari* in this case which was granted by this Court. *Motion papers*, pp. 7-10.

III. It has been settled by the recent decisions of this Court that a suit in admiralty is a new trial on appeal even in this Court.

> *Reid* v. *Fargo*, 241 U. S. 544 (1916);
> *Watts* v. *Unione Austriaca*, 248 U. S. 9 (1918);
> *The John Twohy*, 255 U. S. 77 (1921).

Consequently, it is submitted that the petitioner should be allowed to have on the record in this case, before the argument is had in this Court, all the proofs that will be necessary in order to give this Court full opportunity to deal with the case as justice may require.

IV. Rule 12 of the Rules of this Court provides in Section 2 for the taking of new evidence in cases of admiralty and maritime jurisdiction.

Apparently, the rule provides for the issuance of a commission upon interrogatories and cross-interrogatories as the usual procedure.

The Rule, however, contains a proviso as follows:

> "Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open Court in cases where by law it is admissible."

V. The petitioner realizes that new testimony is not allowed to be taken in this Court as a matter of course even under this rule.

The Mabey, 10 Wall. 419 (1870).

And that new evidence will not be allowed to be taken when the person applying to secure the new evidence has himself been responsible for the omission in the courts below of the new evidence sought to be introduced here.

The Mabey, 13 Wall. 738 (1871).

VI. But in the present case, it is submitted that the petitioner has shown a perfectly good reason why it did not secure either in the District Court or in the Circuit Court of Appeals the evidence which it now seeks to take here.

The reason that the new evidence sought to be introduced here as to the settlement between the Southern Pacific Company and the Director General of Railroads with regard to the value of the *Proteus* was not secured in the District Court was that the settlement had not been made when the case was tried there.

As the petitioner is informed and believes, the settlement was made between the time of the decision of the Court below and the decision of the Circuit Court of Appeals.

The petitioner did not learn of this settlement until after the expiration of the term of the Circuit Court of Appeals, when that Court was powerless to act in the matter.

There remained, therefore, only one recourse for the petitioner, namely, to ask this Court to allow the taking of the new evidence.

VII. In order that this Court might be fully advised that this application for the taking of new evidence was necessary and would be made, the whole situation was fully set forth in the 11th, 12th, 13th and 14th paragraphs of the petition for *certiorari*, which are quoted *in extenso* in the motion papers. *Motion papers*, pp. 7-10.

VIII. Leave to have a Commission take new evidence on interrogatories would not meet the petitioner's difficulties for the reason above stated that it does not now know whom it will have to examine in connection with the matter, and it cannot know, until it has had an opportunity of questioning the Director General of Railroads.

IX. It is submitted, therefore,

(1) that a clear case entitling the petitioner to take new evidence in this Court has been made out and

(2) that the petitioner has also shown the necessity of having this evidence taken orally before a Commissioner appointed by this Court.

X. There is ample time for the taking of this evidence in this manner because this case cannot possibly be reached on the Calendar of this Court for argument until sometime during the winter of 1925.

The respondents will not be prejudiced, therefore, as to the time of final adjudication of the case by the granting of this motion.

XI. It would ill become the respondents to endeavor to avoid a full inquiry into this phase of the case. If they do endeavor to do so, it will imply a confession of fear as to the result of having the truth known.

XII. It must be remembered that this motion does not involve a request for a chance to get evidence of independent witnesses. *It involves a justifiable demand for a right to secure evidence from the opposing parties, the respondents, who have suppressed it and have hitherto blocked all attempts to secure information.*

WHEREFORE the petitioner submits, that it has made out a case for the taking of new evidence within the spirit of the rule under the proviso above quoted in Rule 12, Sec. 2 of the Rules of this Court now in force, and that this Court, in the exercise of its plenary power to vary or extend its own rules in order to serve the ends of justice, should grant the motion as made, and make an order appointing a Commissioner to take evidence orally and report it duly certified to this Court and giving the Commissioner such powers as will enable him to sit in Washington or New York in his discretion as necessity may be shown.

Respectfully submitted,

WILLIAM H. MCGRANN,
JOHN M. WOOLSEY,
Counsel for Petitioner.

New York, April 1924.

SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY (NEW JERSEY), *Petitioner,* *against* SOUTHERN PACIFIC COMPANY, and JAMES C. DAVIS, Director General of Railroads, Respondents.	OCTOBER TERM, 1923 No. 607

INTERROGATORIES TO OFFICERS AND EMPLOYEES AND TO FORMER OFFICERS AND EMPLOYEES OF THE RAILROAD ADMINISTRATION.

INTERROGATORIES ADDRESSED BY COUNSEL FOR THE PETITIONER TO

James C. Davis, DIRECTOR GENERAL OF RAILROADS;
Frank Wright, FORMERLY RAILROAD ADMINISTRATION'S REPRESENTATIVE IN MARINE MATTERS;
L. J. Tracy, COMPTROLLER OF THE RAILROAD ADMINISTRATION; AND
Ralph Blaisdell, TREASURER OF THE RAILROAD ADMINISTRATION,

IN PURSUANCE OF LEAVE GIVEN BY AN ORDER OF THE SUPREME COURT OF THE UNITED STATES MADE AND ENTERED IN THE ABOVE SUIT ON MAY 5, 1924, TO BE BY THEM AND EACH OF THEM ANSWERED IN WRITING AND UNDER OATH:

FIRST: State your name, age, residence and present occupation.

SECOND: What position or positions did you occupy between August 1, 1918 and August 1, 1924?

THIRD: At or about the time when, or at some time after, the Railroad Administration took over the properties of the Southern Pacific Company and its subsidiaries in pursuance of the Act of Congress of August 26, 1916, Chapter 418, Paragraph 1, 39 Stat. 645. and of the proclamation of the President of December 16, 1917, was there an agreement in writing entered into by and between the Southern Pacific Company and/or its subsidiaries with the United States?

FOURTH: If you answer the Third Interrogatory in the affirmative, will you please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

FIFTH: After the loss of the steamship *Proteus* whilst in possession of the Director General of Railroads on August 19, 1918, were there any negotiations had between the Director General of Railroads and the Southern Pacific Company in connection with a payment to the Southern Pacific Company by and in behalf of the Director General of Railroads for the loss of the *Proteus*?

SIXTH: If you answer the preceding interrogatory in the affirmative, state when these negotiations began

and by whom they were conducted on behalf of the Director General of Railroads and on behalf of the Southern Pacific Company.

SEVENTH: Were any of these negotiations in writing in the form of letters, telegrams or other writings?

EIGHTH: If you answer the preceding interrogatory in the affirmative, please produce true copies of any letters, telegrams, or other writings exchanged between the Director General of Railroads and/or any of his agents or employees, and the Southern Pacific Company and/or any of its agents or employees, in connection with such negotiations, and hand them to the Commissioner to be marked and used as exhibits in this cause.

NINTH: If you state that there were negotiations had, as asked in the Fifth, Sixth, Seventh and Eighth Interrogatories, will you state whether, as a result of those negotiations, there was any agreement reached as to the amount which should be paid by the Railroad Administration to the Southern Pacific Company for the loss of the *Proteus?*

TENTH: If you answer the Ninth Interrogatory in the affirmative, will you please state when such an agreement was reached and what amount the Director General of Railroads agreed to pay to the Southern Pacific Company for the loss of the *Proteus.*

ELEVENTH: Was there any written contract entered into by and between the Director General of Railroads

and the Southern Pacific Company embodying the agreement mentioned in the Ninth and Tenth Interrogatories?

TWELFTH: If you answer the Eleventh Interrogatory in the affirmative, please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

THIRTEENTH: If there was not any formal written agreement, please produce any letters, telegrams, or other documents or writings which may have embodied the final agreement by and between the Director General of Railroads and the Southern Pacific Company as to the amount which was to be paid for the loss of the *Proteus*.

FOURTEENTH: If you answer the Ninth and Tenth Interrogatories in the negative, state whether or not an item representing the amount to be paid for the loss of the *Proteus* appeared in any schedule of items embodied in any general settlement between the Director General of Railroads and the Southern Pacific Company?

FIFTEENTH: If you answer the Fourteenth Interrogatory in the affirmative, state the amount of the item representing the amount to be paid for the loss of the *Proteus*.

SIXTEENTH: If you state an amount in answer to the Ninth and Tenth Interrogatories and/or in answer to the Fourteenth and Fifteenth Interrogatories which fixed the amount of payment to be made for the loss of the *Proteus*, state whether or not that amount included in-

terest from the date of the loss, and if it did not, whether any other or further payment was made on account of interest on the said amount.

SEVENTEENTH: If in answer to the Ninth and Tenth Interrogatories and/or the Fourteenth and Fifteenth Interrogatories, you have stated an amount agreed to be made as a payment for the loss of the *Proteus*,

(a) State whether or not in arriving at that amount you took into consideration the value of the *Proteus* which had been fixed by the Commissioner and by the United States District Court for the Southern District of New York in this litigation?

(b) If you did not take into consideration the value of the *Proteus* fixed by the Commissioner and the said United States District Court in this case, will you state on what you based the amount to be paid by the Director General of Railroads to the Southern Pacific Company for the loss of the *Proteus*.

EIGHTEENTH: Was the agreed amount to be paid for the loss of the *Proteus* ever paid by the Director General of Railroads to the Southern Pacific Company?

NINETEENTH: If you answer the Eighteenth Interrogatory in the affirmative, will you state the date of this payment, the total amount thereof, and the person to whom it was made?

TWENTIETH: Was there any final written agreement of settlement made between the Director General of Rail-

roads on the one hand and the Southern Pacific Company and its subsidiary companies on the other?

TWENTY-FIRST: If you answer the Twentieth Interrogatory in the affirmative, will you state when this final agreement of settlement was made and by whom it was signed on behalf of the several parties?

TWENTY-SECOND: If you state there was such an agreement, will you please produce a true copy thereof and hand it to the Commissioner to be marked as an exhibit and used in this cause?

TWENTY-THIRD: If it is a fact that there was a lump sum settlement made by and between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other, will you state what the amount of that lump sum settlement was and what was allowed in such lump sum settlement on account of the loss of the steamship *Proteus*?

TWENTY-FOURTH: In pursuance of the final settlement, were there any releases exchanged by and between the Railroad Administration and the Southern Pacific Company and its subsidiary companies?

TWENTY-FIFTH: If you answer the Twenty-fourth Interrogatory in the affirmative, will you please produce and hand to the Commissioner to be marked and used as exhibits a true copy or copies of any and all such releases?

TWENTY-SIXTH: (a) Were there any oral negotiations on the subject of the value of the *Proteus?*

(b) If so, where did they occur and between what persons were they held?

TWENTY-SEVENTH: (a) During the negotiations was either the Director General of Railroads or the Southern Pacific Company represented by any lawyer?

(b) If so, what was the name of the lawyer representing the Director General of Railroads and what was the name of the lawyer representing the Southern Pacific Company?

(c) If you state that there were lawyers and give their names, will you please state to what firm or firms the said lawyers belonged?

TWENTY-EIGHTH: Did the Director General of Railroads receive any letters written by a lawyer or lawyers representing the Southern Pacific Company regarding a settlement for the loss of the *Proteus?*

TWENTY-NINTH: If he did, will you please produce a true copy of such letter or letters and hand them to the Commissioner to be marked and used in this cause.

THIRTIETH: If there are within your knowledge any other facts or circumstances or writing in connection with said agreement on the amount which was paid for the loss of the *Proteus* or the actual payment made by the Director General for the loss of the *Proteus,* about which you

have not been specifically interrogated in the foregoing interrogatories, state fully such facts and circumstances as are within your knowledge and produce any such writings to be marked by the Commissioner and used as exhibits herein.

WILLIAM H. MCGRANN,

JOHN M. WOOLSEY,

Counsel for Standard Oil Company,
Petitioner.

SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY (New Jersey), *Petitioner,* *against* SOUTHERN PACIFIC COMPANY, and JAMES C. DAVIS, Director General of Railroads, *Respondents.*	OCTOBER TERM, 1923. No. 607.

INTERROGATORIES TO OFFICERS AND EMPLOYEES OF SOUTHERN PACIFIC COMPANY.

INTERROGATORIES ADDRESSED BY COUNSEL FOR THE PETITIONER TO

Julius Kruttschnitt, CHAIRMAN OF BOARD OF DIRECTORS OF THE SOUTHERN PACIFIC COMPANY;

Andrew K. Van Deventer, TREASURER OF THE SOUTHERN PACIFIC COMPANY;

Hugh Neill, SECRETARY OF THE SOUTHERN PACIFIC COMPANY; AND

Carl W. Jungen, MANAGER OF THE SOUTHERN PACIFIC COMPANY'S ATLANTIC STEAMSHIP LINES,

IN PURSUANCE OF LEAVE GIVEN BY AN ORDER OF THE SUPREME COURT OF THE UNITED STATES MADE AND ENTERED

IN THE ABOVE SUIT ON MAY 5, 1924, TO BE BY THEM AND EACH OF THEM ANSWERED IN WRITING AND UNDER OATH:

FIRST: State your name, age, residence and present occupation.

SECOND: What position or positions did you occupy between August 1, 1918 and August 1, 1924?

THIRD: At or about the time when, or at some time after, the Railroad Administration took over the properties of the Southern Pacific Company and its subsidiaries in pursuance of the Act of Congress of August 26, 1916, Chapter 418, Paragraph 1, 39 Stats. 645, and of the proclamation of the President of December 16, 1917, was there an agreement in writing entered into by and between the Southern Pacific Company and/or its subsidiaries with the United States?

FOURTH: If you answer the third interrogatory in the affirmative, will you please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause?

FIFTH: After the loss of the steamship *Proteus* whilst in possession of the Director General of Railroads, were there any negotiations had between the Director General of Railroads and the Southern Pacific Company in connection with a payment to the Southern Pacific Company by or in behalf of the Director General of Railroads for the loss of the *Proteus*?

SIXTH: If you answer the preceding interrogatory in the affirmative, state when these negotiations began and by whom they were conducted on behalf of the Director General of Railroads and on behalf of the Southern Pacific Company?

SEVENTH: Were any of these negotiations in writing in the form of letters, telegrams or other writings?

EIGHTH: If you answer the preceding interrogatory in the affirmative, please produce true copies of any letters, telegrams, or other writings exchanged between the Director General of Railroads and/or any of his agents or employees, and the Southern Pacific Company and/or any of its agents or employees, in connection with such negotiations, and hand them to the Commissioner to be marked and used as exhibits in this cause.

NINTH: If you state that there were negotiations had, as asked in the Fifth, Sixth, Seventh and Eighth Interrogatories, will you state whether, as a result of those negotiations, there was any agreement reached as to the amount which should be paid by the Railroad Administration to the Southern Pacific Company for the loss of the *Proteus*?

TENTH: If you answer the Ninth Interrogatory in the affirmative, will you please state when such an agreement was reached and what amount the Director General of Railroads agreed to pay to the Southern Pacific Company for the loss of the *Proteus*?

ELEVENTH: Was there any written contract entered into by and between the Director General of Railroads and the Southern Pacific Company embodying the agreement mentioned in the Ninth and Tenth Interrogatories?

TWELFTH: If you answer the Eleventh Interrogatory in the affirmative, please produce a true copy of such agreement and hand it to the Commissioner to be marked and used as an exhibit in this cause.

THIRTIETH: If there was not any formal written agreement, please produce any letters, telegrams, or other documents or writings which may have embodied the final agreement by and between the Director General of Railroads and the Southern Pacific Company as to the amount which was to be paid for the loss of the *Proteus*.

FOURTEENTH: If you answer the Ninth and Tenth Interrogatories in the negative, state whether or not an item representing the amount to be paid for the loss of the *Proteus* appeared in any schedule of items embodied in any general settlement between the Director General of Railroads and the Southern Pacific Company?

FIFTEENTH: If you answer the Fourteenth Interrogatory in the affirmative, state the amount of the item representing the amount to be paid for the loss of the *Proteus*.

SIXTEENTH: If you state an amount in answer to the Ninth and Tenth Interrogatories and/or in answer to the Fourteenth and Fifteenth Interrogatories which

fixed the amount of payment to be made for the loss of the *Proteus,* state whether or not that amount included interest from the date of the loss, and if it did, whether any other or further payment was made on account of interest on the said amount.

SEVENTEENTH: If in answer to the Ninth and Tenth Interrogatories and/or the Fourteenth and Fifteenth Interrogatories, you have stated an amount agreed to be made as a payment for the loss of the *Proteus,*

(a) State whether or not in arriving at that amount you took into consideration the value of the *Proteus* which had been fixed by the Commissioner and by the United States District Court for the Southern District of New York in this litigation?

(b) If you did not take into consideration the value of the *Proteus* fixed by the Commissioner and the said United States District Court in this case, will you state on what you based the amount which was agreed on to be paid by the Director General of Railroads to the Southern Pacific Company for the loss of the *Proteus.*

EIGHTEENTH: Was the agreed amount to be paid for the loss of the *Proteus* ever paid by the Director General of Railroads to the Southern Pacific Company?

NINETEENTH: If you answer the Eighteenth Interrogatory in the affirmative, will you state the date of this payment, the total amount thereof, and the person to whom it was made?

TWENTIETH: Was there any final written agreement of settlement made between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other?

TWENTY-FIRST: If you answer the Twentieth Interrogatory in the affirmative, will you state when this final agreement of settlement was made and by whom it was signed on behalf of the several parties?

TWENTY-SECOND: If you state there was such an agreement, will you please produce a true copy thereof and hand it to the Commissioner to be marked as an exhibit and used in this cause?

TWENTY-THIRD: If it is a fact that there was a lump sum settlement made by and between the Director General of Railroads on the one hand and the Southern Pacific Company and its subsidiary companies on the other, will you state what the amount of that lump sum settlement was and what was allowed in such lump sum settlement on account of the loss of the steamship PROTEUS?

TWENTY-FOURTH: In pursuance of the final settlement, were there any releases exchanged by and between the Railroad Administration and the Southern Pacific Company and its subsidiary companies?

TWENTY-FIFTH: If you answer the Twenty-fourth Interrogatory in the affirmative, will you please produce and hand to the Commissioner to be marked and used as

exhibits a true copy or copies of any and all such releases?

TWENTY-SIXTH: (a) Were there any oral negotiations on the subject of the value of the PROTEUS?

(b) If so, where did they occur and between what persons were they held?

TWENTY-SEVENTH: (a) During the negotiations was either the Director General of Railroads or the Southern Pacific Company represented by any lawyer?

(b) If so, what was the name of the lawyer representing the Director General of Railroads and what was the name of the lawyer representing the Southern Pacific Company?

(c) If you state that there were lawyers and give their names, will you please state to what firm or firms the said lawyers belonged?

TWENTY-EIGHTH: Did the Southern Pacific Company receive any letters from counsel for the Director General of Railroads regarding any negotiations for settlement of the loss of the *Proteus*?

TWENTY-NINTH: If it did, will you please produce a true copy of such letter or letters and hand them to the Commissioner to be marked and used in this cause?

THIRTIETH: If there are within your knowledge any other facts or circumstances or writing in connection

with said agreement on the amount which was paid for the loss of the *Proteus* or the actual payment made by the Director General for the loss of the *Proteus*, about which you have not been specifically interrogated in the foregoing interrogatories, state fully such facts and circumstances as are within your knowledge and produce any such writings to be marked by the Commissioner and used as exhibits herein.

WILLIAM H. MCGRANN,

JOHN M. WOOLSEY,

Counsel for Standard Oil Company,
Petitioner.

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FIRST POINT.

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ANY ALLOWANCE THAT CAN NOW BE MADE HEREIN FOR THE LOSS OF THE *Proteus* CAN ONLY BE FOR A PAYMENT TO THE DIRECTOR GENERAL OF SUCH AN AMOUNT, NOT EXCEEDING THE AMOUNT THUS PAID BY HIM IN SETTLEMENT, AS WILL REPRESENT THE VALUE OF THE *Proteus* 20

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SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY OF NEW JERSEY, *Petitioner,* *against* SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, *Respondents.*	October Term, 1924. No. 197

BRIEF FOR THE PETITIONER

STATEMENT.

I. THE RECORD BEFORE THIS COURT.

This cause comes before this Court in pursuance of a writ of certiorari issued on November 12, 1923, *Record,* p. 232, 263 U. S. 696, to review the decree of the United States Circuit Court of Appeals for the Second Circuit in a case arising out of a collision which occurred on August 19, 1918, between the steamship *Cushing,* owned by the petitioner, and the steamship *Proteus,* owned by the Southern Pacific Company, and then in possession of, and being operated by, the Director General of Railroads.

The *Proteus* was a total loss.

Both vessels were held at fault by the District Court, *The Cushing,* 266 Fed. 570.

Before a Commissioner, who was appointed to assess damages, the valuation of the *Proteus* was fixed at the sum of $750,000, plus interest, and this valuation was confirmed by the District Court. *The Cushing,* 285 Fed. 617

The Circuit Court of Appeals affirmed the decree of the District Court in respect to the finding that both vessels were to blame, but modified the decree below by increasing the valuation of the *Proteus* to the sum of $1,225,000 plus interest. *The Cushing,* 292 Fed. 560.

After the term at which the decision of the Circuit Court of Appeals was rendered had expired and further relief from the Courts below was impossible, the counsel for the petitioner first learned that a final settlement had been arrived at between the Southern Pacific Company and the Director General of Railroads, by which a sum had been paid to the Southern Pacific Company in full settlement and discharge of its claim against the Director General of Railroads for the loss of the *Proteus.*

The owner of the *Cushing* applied for a writ of certiorari to this Court on the 22nd day of October, 1923, and in its application stated that in view of the settlement between the Southern Pacific Company and the Director General of Railroads, it would apply to the Court for leave to take new evidence in this Court on

the subject matter of this settlement, in order to be able to deal on the argument with the legal results flowing therefrom.

After the petition for *certiorari* was granted some of the cargo and other claimants who had been awarded recoveries in the limitation proceeding were paid the amount of their damages, and an order entered in this Court severing their claims from the suit, and leaving only the adjustment of the damage for loss of the *Proteus* for determination.

The decision of the Courts below holding both vessels to blame is, therefore, not challenged here.

On April 28, 1924, a motion for leave to take new evidence was made in this Court and an order giving leave to take this evidence was entered here on May 5, 1924.

This motion for leave to take new evidence was strenuously opposed by the counsel for the Southern Pacific Company.

The new evidence was taken during the past summer in pursuance of the terms of the order and has been printed as a second volume of the record on which this case will be argued in this Court.

The case is unusual, if not unique, in the practice followed of taking new evidence in this Court.

The main record which came up from below will, for convenience, be hereinafter referred to as the *Record*,

and the new evidence taken in this Court as the *Commission.*

II. The Procedure below.

a. *Pleadings, Orders and Decisions.*

The steamship *Proteus,* with other floating equipment of the Southern Pacific Company, was taken into the possession and control of the Director General of Railroads on December 28, 1917, in pursuance of war powers granted to the President by the Act of Congress of August 26, 1916, Chap. 418, Par. 1, 39 Stat. 643, and the Proclamation of the President, thereunder, dated December 26, 1917.

The details of this exercise of the power of eminent domain are more fully set forth in *Appendix I* hereof.

At the time of the collision with the *Cushing,* and the sinking of the *Proteus* on August 19, 1918, the *Proteus* was being operated at the expense of the Director General of Railroads. All the navigators of the *Proteus* were employes of the Railroad Administration. *Paragraph Third, Petition of Southern Pacific Company and Walker D. Hines, as Director General of Railroads. Record,* pp. 10-11.

If she had not been lost the *Proteus* would have remained under sole control of the Railroad Administration until March 1, 1920. *Record,* p. 180.

The steamship *Cushing* was owned and operated by the petitioner, Standard Oil Company (New Jersey).

As a result of the collision, petitions for limitation of liability were filed in the United States District Court for the Southern District of New York, on behalf of both vessels.

The Standard Oil Company (New Jersey), as owner of the steamship *Cushing* filed its petition for exemption from or limitation of its liability on March 14, 1919.

The Southern Pacific Company, as owner of the *Proteus,* and Walker D. Hines, as Director General of Railroads, filed a petition also, seeking exemption from or limitation of liability of the *Proteus* on or about July 18, 1919.

The causes were subsequently consolidated under order entered November 23, 1922, and Walker D. Hines was succeeded as a party by James C. Davis, then and now Director General of Railroads.

The trial of the consolidated cases on the merits resulted, as above mentioned, in a decision holding both vessels to blame, and carrying with it a division of the damages between them.

A large number of claims had been filed in the limitation proceedings brought by the Standard Oil Company, and on August 30, 1921, Mr. Edwards H. Childs was appointed Commissioner by the United States District Court to determine and report these damages, as well as the damage sustained by the vessel owners.

The Commissioner separated from the other claims the damages to be awarded on account of the loss of the

Proteus, and filed a separate report thereon, under date of April 21, 1922. The allowance under that report is the only part of the total damages which now forms the subject of review on the writ of certiorari here.

The Commissioner found that the "damages to be awarded to the claimant on account of the loss of the ship (*Proteus*) should be the sum of $750,000, with interest thereon, from August 19, 1918, the date of the loss." *Record,* pp. 190-191.

Exceptions were filed to the Commissioner's findings both by the owner of the *Cushing* and by the Southern Pacific Company.

After argument before Judge Mack, a Circuit Judge sitting by special assignment in the District Court for the Southern District of New York, the Commissioner's report was confirmed, October 17, 1922, and the damage for loss of the *Proteus* was fixed in the sum of $750,000 with interest from the date of the loss. *Record,* pp. 192-196. *The Cushing,* 285 Fed. 617.

On December 19, 1922, a settlement was agreed upon between the Southern Pacific Company and James C. Davis, Director General of Railroads, and payment was made thereunder to the Southern Pacific Company covering *"all claims, rights and demands of every kind and character"* which the Southern Pacific Company then had or thereafter might have or claim against the Director-General arising out of the possession, use and operation of the Southern Pacific Company's properties by the United States while under Federal Control.

This settlement included the claim of the Southern Pacific Company against the Director General of Railroads for loss of the steamship *Proteus*. *Commission*, pages 39, 63 and 64.

Subsequently, on December 27, 1922, the petitioner, Standard Oil Company (New Jersey), appealed from the final decree on the merits.

On January 27, 1923, the Southern Pacific Company also appealed from the decree insofar as the value of the *Proteus* is fixed therein. *Record*, pp. 217-220.

The Director General of Railroads did not take any appeal, and should be held to have acquiesced in the valuation of the Proteus which was fixed by the District Court.

The notice of appeal and the assignments of error filed on behalf of the *Proteus* to the Circuit Court of Appeals for the Second Circuit were made only by *"proctors for claimant, Southern Pacific Company."* *Record*, pp. 218, 219.

It is to be remembered that these appeals were both taken AFTER *the settlement had been reached between the Southern Pacific Company and James C. Davis, Director General of Railroads, as above stated.*

The Standard Oil Company was not aware that any settlement had been made.

The appeals were heard by the Circuit Court of Appeals for the Second Circuit, which rendered an opinion on July 16, 1923, affirming the decree of the District

Court on the merits of the collision—*i. e.*, holding both vessels equally at fault—but modifying the award for the item of damage representing the value of the steamship *Proteus*, by increasing the allowance for her loss from $750,000 to $1,225,000, an increase of $475,000 over the award by the Commissioner, *who saw and heard all the witnesses on this point*, and by Judge Mack who confirmed the Commissioner's Report. *The Cushing*, 292 Fed. 560.

The formal order, modifying the decree below and embodying this decision was entered on July 23, 1923. *Record*, p. 231.

b. *The Commissioner's Findings.*

The hearings on the measure of damage due to the total loss of the *Proteus*, designated as Claim No. 1, began on December 7, 1920, before the Commissioner, Edwards H. Childs, Esq., an experienced lawyer. *Record*, p. 27.

The hearings were not concluded until June 17, 1921. *Record*, pp. 160, 180.

Briefs were subsequently submitted, and the Commissioner did not finally reach his conclusions until April 21, 1922. *Record*, p. 191.

Ten (10) witnesses appeared before the Commissioner during this period and testified at length, five on behalf of the *Proteus* and an equal number on behalf of the *Cushing*.

Six (6) of these witnesses testified particularly as to the "value" of the *Proteus* as of the date of her loss, August 19, 1918.

The Commissioner not only had the opportunity of hearing these witnesses and observing their demeanor under examination by counsel, but, as appears from the record, he interrogated them himself.

As to the two groups of "three experts on each side", he concluded, after considering their testimony, that "the result of such consideration is that the views of the petitioner's witnesses seem to me more nearly in accord with the probabilities in the case at bar than those of claimant's witnesses." *Record*, p. 190. The "petitioner's witnesses" were those who testified on behalf of the Standard Oil Company and the "claimant's witnesses" were those who testified on behalf of the Southern Pacific Company.

The Commissioner discussed the testimony of each witness in a comprehensive report, and summarized his conclusions as follows:

"• • • The market for all such ships" (i. e. American vessels of the class of the *Proteus*) "was closed during the war and in August, 1918, the *Proteus* had no market value." *Record*, p. 183.

• • • • • •

"The claimant" (Southern Pacific Company) "adopted the latter method" (cost of reproduction less depreciation) "and bases its case principally upon the testimony of experts with respect to what, in their opinion, it would have cost to reproduce the *Proteus* in August, 1918, and with respect to the amount that should be deducted from such estimated cost for depreciation during the 18 years that the ship had been in use." *Record*, p. 183.

The petitioner urged that:

"• • • In the absence of a market value no other method should be followed *exclusively* • • •" (Italics ours.) *Record*, p. 184.

• • • • • •

"• • • The claimant's experts think the ship was worth more than twice as much as the petitioner's experts think she was worth and the parties are accordingly more than $600,000 apart in their claims." *Record*, p. 183.

In discussing the reproduction and depreciation theory on which the claimant (Southern Pacific Company) rested its case, the Commissioner found the claimant's (*Proteus'*) method of starting with the replacement value of August, 1918, objectionable, "*because of the fact that the vessel could not have been replaced at that time*". (Italics ours.) *Record*, p. 184.

It was conceded by the claimant's (*Proteus'*) witness called to establish the replacement value that "his company could not have done the work 'because our plant was entirely under the control of the Government as to its output'; and such was the case generally." • • • "The fact that the ship could not have been built for a private owner was due to the war, and it would seem to me, therefore, that if we took those prices as a basis from which to ascertain the value of the ship, we would be adopting a purely artificial standard." *Record*, p. 184.

Also, the Commissioner expressed the view that the claimant (*Proteus*) "erred in failing to give effect to the fact that at the time of the loss the ship was under

requisition," and he stated: "At the time of the loss the claimant was not only unable to sell the ship" (i. e. the *Proteus*) "but was barred by law from using or disposing of her in any way." *Record*, p. 184.

Although the Commissioner heard evidence as to insured values, and also as to the "book value" of the *Proteus*, which had been carried on the claimant's (Southern Pacific Co.'s) books in the sum of $224,986.49, he stated that his conclusions "would not be affected if all such evidence were stricken out"; and, further, that:

> "It is true, of course, that we are not obliged to apply any particular theory and that all of the evidence offered must be considered to ascertain whether on the whole case it is possible to determine the claimant's actual pecuniary loss with any reasonable degree of certainty." *Record*, p. 185.

He also said that he did not feel

> "called upon to adopt any particular theory under which by means of mathematical calculations, a final figure would be produced that should be accepted as exact and conclusive; * * *" *Record*, p. 190.

He concluded by stating:

> "Approaching the question in this way, and considering the whole case, I conclude that the damages to be awarded to the claimant" (*Proteus*) "on account of the loss of the ship should be the sum of $750,000, with interest thereon from August 19, 1918, the date of the loss." *Record*, pp. 190-191.

Thus the Commissioner, in the absence of all possibility of establishing a *"market value,"* refused to accept as conclusive the equally speculative *"reproduction and depreciation"* method of valuation relied on by the claimant—Southern Pacific Company. He properly preferred, after seeing and hearing all the witnesses, to consider all relevant facts established by the evidence and to resolve them into an amount which he deemed to be a fair recompense for the loss of the *Proteus.*

We shall endeavor to show that the Commissioner's method of arriving at the measure of the loss, under the circumstances here, is the only satisfactory way, and that it is supported by the weight of authority.

c. *District Court's confirmation of the Commissioner's Findings.*

The exceptions to the Commissioner's report were argued before Circuit Judge Mack on May 23, 1922, and written briefs were submitted later.

Judge Mack handed down a decision affirming the Commissioner's report on October 17, 1922.

He found that:

> "In August, 1918, practically all American ships of the size and type of the *Proteus* were under requisition, and the market for all such ships was for all substantial purposes closed during the war. * * *" *Record,* p. 192, and;
>
> "* * * while the market price may be the fairest test of the value of standard commodities commonly bought and sold, when the normal con-

ditions of free competition have full play, this test obviously fails not only if there is no market but when the conditions which make the test a proper one do not obtain. * * *" *Record,* p. 193; and,

"* * * It is not necessary to consider here what would be fair value under the circumstances between private litigants if the steamship *Proteus* had not been under requisition. The *Proteus* was under requisition and the ascertainment of her value must be predicated on that fact. * * *" *Record,* p. 193, and;

"* * * If evidence is adduced, indicating that the market price is not fair under the circumstances, then all other relevant facts should likewise be considered in determining fair value, unless indeed some positive form for ascertaining value is established by legislation. Cf. the Rate Regulation Cases; Minnesota Rate Cases, 230 U. S. 352, 434." * * * *"All the relevant facts should be considered.* * * *" *Record,* p. 193.

Judge Mack then discussed all the factors entering into a determination of the ascertainment of a "fair value" for the *Proteus* at the time of her loss, and an adequate compensation to the owner, including the reproduction and depreciation theory on which the claimant rested its claim, and arrived at the conclusion that "the result reached by the Commissioner would seem to afford full and ample compensation", and confirmed the amount as fixed by the Commissioner, namely, $750,000 with interest from the date of the loss. *Record,* p. 196.

d. *The Rule of Valuation adopted and applied by the Circuit Court of Appeals for the Second Circuit.*

The appeal to the Circuit Court of Appeals for the Second Circuit involved both the merits of the collision and the award of damages for loss of the *Proteus*.

That Court affirmed the District Court's findings on the merits, but increased the award for loss of the *Proteus* to the sum of $1,225,000, plus interest from the date of the loss, in its opinion dated July 16, 1923. *Record*, pp. 222-230. Thus the Circuit Court of Appeals made an additional allowance in the sum of $475,000 plus interest on that amount, or 63⅓% more than the amount which the Commissioner and Circuit Judge Mack had awarded.

Necessarily, such a wide diversity as is shown by these amounts indicates the application of an equally divergent view as to the method of arriving at valuation under the circumstances existing in this case.

The Circuit Court of Appeals rested its decision squarely on the rule of "*cost of production less depreciation*", stating, at page 229 of the *Record*:

> "Assuming, as claimed, there was no market value in August, 1918, because such steamships could not be purchased because none were on the market or because it was difficult, if not impossible, to obtain a shipbuilder to construct one, then these special circumstances invoke the rule of damages of cost of production less depreciation."

[The Court evidently meant *re*production or *present* cost of production, not original cost.]

The Court then fixed the value in the sum of $1,225,000, obviously by adopting *in toto* the formula applied by one of the witnesses for the *Proteus* interests. *Record*, p. 230. That witnesses's formula is expressed in an answer to one question as follows:

> "Q. Mr. Martin, how did you get at this value of $1,225,000? What does it represent?
>
> "A. There being no sales to guide me, I took the estimated cost of the reproducing a vessel of the same size and description as the *Proteus* in August, 1918; and the estimated cost was $1,750,000. From that cost I deducted 2½% for 18 years' depreciation, which is $525,000, leaving a value of *$1,225,000." *Record*, p. 31.

We shall show hereinafter that Mr. Martin's arithmetic was erroneous, to the very substantial disadvantage of the petitioner, in that an error in his calculations increased greatly the amount finally fixed. The Circuit Court of Appeals carried over this same error in mathematics.

But the objection to the ruling of the Circuit Court of Appeals is more substantial than its miscalculations, and is directed to its application for the ascertainment of the *Proteus'* value of an arbitrary formula, which is made up of two factors—"reproduction" cost, and per-

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*The figure is erroneously printed in the Record as $1,235,000. It appears in the original record correctly as $1,225,000.

centage of "depreciation",—both of which are obviously entirely speculative and impossible of definite determination.

In short, although the Commissioner and the District Court considered and weighed the high cost of production prevailing at the time, and used this as one element together with all other relevant facts bearing on the value of the *Proteus;* the Circuit Court of Appeals either entirely disregarded or did not give weight to any other evidence as to value than that of reproduction cost, and rested its decision squarely on that one method of reaching a figure to represent the loss.

III. The petitioner's contentions.

a. *On the Record which has been sent up on Certiorari.*

The petitioner's contention is that while evidence of appreciation in ship's values may be admissible, and is to be considered as one of the factors, yet, inasmuch as the *Proteus* could not have been reproduced at the time, there is not any more reason for adopting a fictitious "*reproduction cost*" as a controlling factor than there would be for adopting a fictitious "*market value.*"

Under the circumstances existing at the time of loss *all elements* bearing on the value of the *Proteus* should have been considered and weighed, and a figure determined therefrom which the exercise of a fair and reasonable judgment would fix as the measure of the damage.

This latter is the standard adopted by the Commissioner and the District Court.

The rule adopted by the Circuit Court of Appeals, however, was to apply an arbitrary formula composed of two wholly speculative factors.

The theory of the Circuit Court of Appeals is open to just the same objections as the market value theory under the circumstances of this case. There was not any market for vessels. There was not any possibility of building a vessel except for the Government.

So *"market price"* and *"reproduction cost"* were both in the same category of purely imaginary figures.

b. *On the new testimony taken in this Court.*

The Petitioner's contentions on this branch of the case are that on the evidence which has been taken in this Court the true relations of the parties is made much clearer than it was in the Courts below, and that the evidence regarding the settlement has eliminated the Southern Pacific Company's claim for the loss of the *Proteus* from the case.

The relations of the parties are as follows:

The Director General, by the President's exercise of his war powers, was in the position of a hiring bailee in possession—the equivalent of a demise charterer, of the *Proteus*.

The Southern Pacific Company as owner of the *Proteus* had nothing whatever to do with her navigation.

It merely had a right to have the *Proteus* safely returned when the Railroad Administration was at an end or to be recompensed in the event of her loss.

The Southern Pacific Company was not liable *in personam,* for it did not employ the persons who were navigating the *Proteus.* It could not be held indirectly liable, at that time, by arrest of the *Proteus* because she was immune from process whilst she was in the Director-General's possession.

The Southern Pacific Company, therefore, had a claim in tort against the Director General and against the *Cushing* and her owner, for the loss of the *Proteus,* which has been found to have been due to the concurrent negligence of the Standard Oil Company (*Cushing*) and the Director General of Railroads (*Proteus*). The Southern Pacific Company also, it is true, had a contract indemnity from the Director General as bailee.

It has now been shown by the new evidence, taken in this Court, that the Southern Pacific Company has settled the Director General's liability in all respects by receiving a money payment approximately on the basis of the District Court valuation, in exchange for a full release without reservations of claims against the *Cushing* or its owner, the Standard Oil Company, or anyone else.

The legal result of the proof of this transaction, which has now with great effort been dragged from the respondents, is that:

(1) The Southern Pacific Company has had satisfaction for the loss of the *Proteus* and cannot seek double or further satisfaction against the Standard Oil Company; and

(2) The Director General, having settled with his bailor, the Southern Pacific Company, would be made whole by an allowance in the collision adjustment of the amount which he paid to his bailor, and is certainly not entitled to more; for his loss on this record is limited at least to his liability to his bailor.

Actually he should not recover quite as much as he paid his bailor, for the Court should find that he paid his bailor a higher amount than the proper valuation of the *Proteus in which he should be held to have acquiesced by not appealing from the decree of the District Court.*

IV. Questions for submission to this Court.

The case involves two points, therefore, for review by this Court:

First: Has the claim for the loss of the *Proteus* been extinguished, or has the amount of the damage recoverable therefor been fixed, by the settlement made under the circumstances herein shown?

Second: By what method shall the value of a vessel, which has been totally lost, be determined in a situation in which it is impossible to prove that at the time of her loss there was a market value either for her sale or for her reproduction?

We shall present the arguments in support of our contentions in that order.

FIRST POINT.

THE SETTLEMENT MADE BETWEEN THE DIRECTOR GENERAL OF RAILROADS AND THE SOUTHERN PACIFIC COMPANY, BY PAYMENT TO THE LATTER OF THE VALUE OF THE *Proteus* IN EXCHANGE FOR A RELEASE, CONSTITUTED A SATISFACTION OF THE CLAIM OF THE SOUTHERN PACIFIC COMPANY IN RESPECT OF THE LOSS OF THE *Proteus*, AND NECESSITATES A REVERSAL OF THE DECREE BELOW AND A DISMISSAL OF THE CLAIM OF THE SOUTHERN PACIFIC COMPANY FOR DAMAGES IN RESPECT OF THE LOSS OF THE *Proteus*.

ANY ALLOWANCE THAT CAN NOW BE MADE HEREIN FOR THE LOSS OF THE *Proteus* CAN ONLY BE FOR A PAYMENT TO THE DIRECTOR GENERAL OF SUCH AN AMOUNT, NOT EXCEEDING THE AMOUNT THUS PAID BY HIM IN SETTLEMENT, AS WILL REPRESENT THE VALUE OF THE *Proteus*.

I. The process of eminent domain by which the United States took possession and control of the Railroad and Water Systems of Transportation has been detailed, so far as relevant to this case, in *Appendix I* hereof.

This Court has summarized the situation as to liability on the part of the railroad companies which were thus dispossessed in *Missouri Pacific Railroad* v. *Ault*, 256 U. S. 554 (1921), at page 557, as follows:

> "The company is clearly not answerable in the present action if the ordinary principles of common law liability are to be applied. The Railroad

Administration established by the President in December, 1917, did not exercise its control through supervision of the owner-companies, but by means of a Director General through 'one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing.' *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 148. This authority was confirmed by the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, and the ensuing Proclamation of March 29, 1918, 40 stat. 1763. By the establishment of the Railroad Administration and subsequent orders of the Director General, the carrier companies were completely separated from the control and management of their systems. Managing officials were 'required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration.' U. S. R. R. Adm., Bulletin No. 4, pp. 113, 114, 313. The railway employees were under its direction and were in no way controlled by their former employers. See Bulletin No. 4, p. 168, Sec. 5; 198 *et seq.*; 330 *et seq.* It is obvious, therefore, that no liability arising out of the operation of these systems was imposed by the common law upon the owner-companies as their interest in and control over the systems were completely suspended."

Among the properties of the Southern Pacific Railroad Company taken over under the laws and proclamations above referred to was the Steamship *Proteus. Commission,* p. 15.

In pursuance of the provisions of the Federal control act of March 21, 1918, and the proclamation of the President of March 29, 1918, a contract was entered into on February 19, 1919, between the Director General of Railroads and the Southern Pacific Company and its subsidiaries, whereby a period of Federal control was fixed as beginning from 12 o'clock midnight, December 31, 1917, *Commission*, p. 14, and whereby provisions were made for the compensation of the Southern Pacific Company and for indemnity against any losses which might occur whilst the railroad and its steamships were in possession of the Director General. *Commission*, pp. 9 to 36.

All the possibly relevant provisions of this contract have been printed as *Appendix II* of this brief.

This agreement among other provisions contained the following (italics ours).

> "If, during Federal control, any of the property described in Paragraph (A) of Section 2 hereof * * * is destroyed or damaged by fire or *marine casualty*, or any of the floating equipment described in paragraph (A) of Section 2 hereof is destroyed or damaged by war risks while in ocean waters outside of the three mile limit, *and is not restored or replaced by the Director General, he shall reimburse the companies the value of the property destroyed or the amount of the damage at the time of the loss;* * * *
>
> * * * * * *
>
> *"The words 'Marine casualty' are used herein as applying to floating equipment and as meaning*

casualties, covered by the usual marine insurance policy, including collision clause, and losses or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosion, bursting of boilers or breakage of shafts or through carrying explosives."

Agreement; Commission pp. 26, 27.

In Section 2, Paragraph A, of the agreement, the *Proteus* and other ocean steamships of the Southern Pacific Company's fleet which were taken by the Director General, were mentioned by name. *Commission,* p. 15.

II. In the early morning of August 19, 1918, whilst thus in the possession and control of and being manned, victualled and operated by the Director General of Railroads, the *Proteus* came into collision with the Standard Oil Company's Steamship *Cushing* at a point about thirty miles below Diamond Shoal Gas Buoy off the South Atlantic Coast. *Opinion of Circuit Court of Appeals, Record* p. 223.

As a result of this collision, the *Proteus* was sunk, and for it the *Proteus* and the *Cushing* were held jointly to blame. *Opinions below, Record,* pp. 18-24, 222-230.

III. After the loss of the *Proteus* in the collision with the *Cushing,* and on December 17, 1919, Mr. Lewis J. Spence, Director of Traffic of the Southern Pacific Company, wrote from its executive offices, 165 Broadway, to Mr. E. R. Richardson, Federal Manager Coastwise Steamship Lines, Pier 49, North River, the following letter:

"Dear Sir: As you are aware, the steamship *'Proteus'* was sunk in collision with a Standard Oil tank steamer off Cape Hatteras on August 19, 1918. Under the contract between the Director General of Railroads and the Southern Pacific Company the former is responsible to the Company for the value of the property destroyed at the time of the loss, in the event the vessel is not restored or replaced by the Director General. I suggest it would be well for representatives of the Director General and of the Company to endeavor now to fix the amount of the liability in the premises of the Director General. I should like to have your views on the subject, and am ready on behalf of the Company to take the matter up with you at any time with a view to arriving at an amicable agreement."

Commission, p. 37.

To which letter, after due time, under date of February 18, 1920, Mr. Richardson replied as follows:

"Dear Sir: I regret delay in replying to your letter of December 17th, regarding the SS. *'Proteus'*, which was sunk in a collision with a Standard Oil tank steamer off Cape Hatteras on August 19, 1918. You then expressed the desire that representatives of the Director-General and the Company endeavor to fix the amount of liability of the Director-General.

"Since receipt of your letter we have been continuously pressing Mr. E. Marvin Underwood, General Counsel of the U. S. Railroad Administration, for some advices along the lines of your suggestion, and we are just in receipt of a tele-

gram from him dated February 17th, reading as follows:

"'Your wire tenth, reference valuation steamship *Proteus*. Do not think practicable to arrive at valuation of steamer before termination Federal control. Period. Matter being considered here and arrangements for valuation will be made at early date.'"

Commission, p. 38.

With the exception of these two letters all negotiations leading up to the settlement hereinafter described are said by the witnesses examined under the Commission issued by this Court, to have been oral.

These oral negotiations are best described by Mr. Davis, present Director General of Railroads, in his answers to the interrogatories.

Mr. Davis says that he was appointed Director General of Railroads on March 28, 1921, and that as such is the Agent of the President in liquidating liabilities of the Government growing out of and connected with Federal control. *Commission*, p. 62.

Then, after putting in evidence the agreement between the Director General and the Southern Pacific Company of February 19, 1919, and stating that there were oral negotiations, he described these negotiations with regard to the loss of the *Proteus* as follows:

"The final settlement with the Southern Pacific Company was the subject of investigation for several months prior to December 19th, 1922. This settlement involved a claim on the part of the

Southern Pacific Company, growing out of the use and operation of its property during the period of Federal control, which aggregated $54,252,694.57, and included in this claim was the claim for the loss of the Steamship *Proteus.* The negotiations leading up to the final settlement were conducted solely by the Director General and his staff. The staff was composed of the late E. M. Alvord, Director Division Liquidation of Claims; Alex. W. Smith, Special Counsel; L. J. Tracy, Comptroller and D. C. Porteous, Director Division on Finance. The negotiations leading to a final settlement covered a number of meetings and conferences from perhaps the 20th of November to the date of the final settlement, December 19th, 1922.

"The Southern Pacific was represented by a number of its managing officers, including A. D. McDonald, its Vice-President and Controller, and J. P. Blair, General Counsel; and before the final adjustment was agreed upon, Mr. Kruttschnitt, Chairman of the Executive Board, appeared before the staff.

* * * * * *

"*Ninth* [Interrogatory]. If you state that there were negotiations had, as asked in the Fifth, Sixth, Seventh and Eighth Interrogatories, will you state whether, as a result of those negotiations, there was any agreement reached as to the amount which should be paid by the Railroad Administration to the Southern Pacific Company for the loss of the *Proteus?*

"*In answer to the ninth interrogatory he saith:* Included in the property of the Southern Pacific Company taken over by the Government

were the Steamship *Proteus* and other property owned and operated by the railroad known as the Atlantic Steamship Lines. A list of the property and ships included in the Atlantic Steamship Lines property taken over is found in Section 2 of the standard contract, copy of which is attached to the answer to Interrogatory 4. During Federal control the Lighter *Confidence* and the Steamship *Proteus* were sunk. In this connection, there were claims made by the Southern Pacific Company for under maintenance of the floating equipment and property taken over by the Government as part of the Atlantic Steamship Lines, and claims for excess maintenance against the Company by the Government on account of this property. On or about the 20th of November, 1922, a conference was had between Mr. Frank C. Wright and other representatives of the Railroad Administration (Mr. Wright represented the Railroad Administration in admiralty matters) and Mr. A. D. McDonald, Vice-President and Controller of the Southern Pacific Company, and other representatives of the Company. This conference was for the purpose of enabling Mr. Wright to recommend to the Director General and his Staff his view of a fair adjustment of the disputed items in the claim of the Southern Pacific Company covering the destruction of the Barge *Confidence,* the loss of the Steamship *Proteus,* and the disputed items of over and under maintenance. As a result of this conference, Mr. Wright recommended to the Director General and his Staff the following adjustment of the items above referred to:

"Allowance to the Company for undermaintenance of terminals, $20,000.00. Allowance to the

Director General for excess maintenance of floating equipment, $235,000.00. This was a net allowance to the Railroad Administration of $215,000.00 excess maintenance.

"It was further recommended that the Railroad Administration allow the Company for the value of the Steamship *Proteus* and the Lighter *Confidence* a lump sum of $885,000.00. It is perhaps fair to state that the amount claimed for the loss of the Lighter *Confidence* was $16,664.00.

"As a result of these various credits and debits, it was recommended by Mr. Wright that the Director General allow the Southern Pacific Company the sum of $670,000.00. This recommendation made by Mr. Wright was for the purpose of assisting the Director General and his staff in concluding a final adjustment of all the claims which the Southern Pacific Company was making against the Government for the use of its property during the period of Federal control.

"*Tenth* [Interrogatory]. If you answer the Ninth Interrogatory in the affirmative, will you please state when such an agreement was reached and what amount the Director General of Railroads agreed to pay to the Southern Pacific Company for the loss of the *Proteus.*

"*In answer to the tenth interrogatory he saith:* A final adjustment was made with the Southern Pacific Company on the 19th of December, 1922, in which the Director General of Railroads agreed to pay and did pay to the Southern Pacific Company the sum of $9,250,000.00 in cash. This was a lump sum adjustment of the entire claim made by the Southern Pacific Company, which aggregated $54,252,694.57."

Commission, pp. 62, 63, 64.

As a result of these negotiations a written agreement of final settlement was entered into on the 19th day of December, 1922.

In commenting on this agreement of settlement and after stating that there was not any other agreement than that which was marked in evidence, as Exhibit B, *Commission,* p. 96, Mr. Davis dealt, in answering the Fourteenth and certain other Interrogatories, with the question whether there was any item in the settlement representing the amount to be paid for the loss of the *Proteus* as follows, *Commission,* pp. 65, 66:

> "The Director General of Railroads, in concluding settlements with the respective carriers whose property was taken over by the Government and operated during the period of Federal control, made no itemized statement showing the amounts that were paid on each item in dispute, which was in anywise communicated to the Company making such settlement, but all of the settlements were what are known as lump sum, in which all items in dispute were included in the final amount offered.
>
> "It is only fair to say, however, that in making each of these settlements the Railroad Administration kept a record, which was exclusively for the use of the Railroad Administration, and was not in anywise communicated to the carriers, showing how the lump sum settlement was finally arrived at, and in the records of the Railroad Administration there appear the items showing how this lump sum was arrived at in making the adjustment with the Southern Pacific Company.

"The Company claimed for the loss of the Steamship *Proteus* $1,268,090.26, and for the loss of the Barge *Confidence* $16,663.80 and, in arriving at the lump sum, the Railroad Administration made an allocation and apportionment on these two items of $885,000.00.

"It is perhaps only fair to state that this allocation and apportionment were made in connection with the adjustment of very many items in dispute, covering an aggregate claim in excess of $54,000,000.00, and no definite agreement as to specific items was made with the Company at the time of the final adjustment."

• • • • • • •

"*Seventeenth.* [Interrogatory.] If in answer to the Ninth and Tenth Interrogatories and/or the Fourteenth and Fifteenth Interrogatories, you have stated an amount agreed to be made as a payment for the loss of the *Proteus*,

"(a) State whether or not in arriving at that amount you took into consideration the value of the *Proteus* which had been fixed by the Commissioner and by the United States District Court for the Southern District of New York in this litigation?

"(b) If you did not take into consideration the value of the *Proteus* fixed by the Commissioner and the said United States District Court in this case, will you state on what you based the amount to be paid by the Director General of Railroads to the Southern Pacific Company for the loss of the *Proteus*.

"*In answer to the seventeenth interrogatory he saith*: A. The Director General and his Staff

and also Mr. Wright had knowledge of the allowance made by the United States District Court in this litigation, and that was one of the matters considered in making the adjustment, but I cannot say that it was controlling.

"B. There was a very careful examination, from all available sources, made as to the actual value of the *Proteus* at the time of its loss, and while, as heretofore stated, the finding of the court was one of the items which influenced the result the final result was obtained from all sources of information available to the Director General.

"*Eighteenth* [Interrogatory.] Was the agreed amount to be paid for the loss of the *Proteus* ever paid by the Director General of Railroads to the Southern Pacific Company?

"*In answer to the eighteenth interrogatory he saith*: The only payment made to the Southern Pacific Company was the final payment made in accordance with the agreement of final settlement, copy of which is hereto attached.

"*Nineteenth.* [Interrogatory.] If you answer the Eighteenth Interrogatory in the affirmative, will you state the date of this payment, the total amount thereof, and the person to whom it was made?

"*In answer to the nineteenth interrogatory, he saith*: The total amount of the payment was $9,250,000.00, and it was made by check issued by the Railroad Administration and payable to the Southern Pacific Company."

Commission, pp. 65, 66.

The final settlement agreement acknowledges the receipt of $9,250,000,

"* * * in full satisfaction and discharge of *all claims, rights and demands, of every kind and character, which the said Companies, or any of them, now have or hereafter may have or claim against the Director General,* or any one representing or claiming to represent the Director General, *the United States, or the President, growing out of or connected with the possession, use, and operation of the Companies' property by the United States during the period of Federal control, or out of the contract between the parties dated the 19th day of February, 1919;* and the said Companies, both jointly and severally, hereby acknowledge the return to and receipt by them of all their property and rights which they are entitled to, and *further acknowledge that the Director General has fully and completely complied with and satisfied all obligations on his part, or on the part of the United States, or the United States Railroad Administration, growing out of Federal control.*" (Italics ours.)

Commission, p. 97.

The reservations contained in the final settlement agreement do not affect the situation in this case in any way. *Exhibit B, Commission,* p. 98.

They merely deal with the obligation of the Director General under the contract of February 19, 1919, to hold the companies harmless against certain claims.—*Contract, Sec. 4, Subdivisions i and j, Commission,* pp. 82-83—and the appropriate complementary right of the Director General to object to settlement of such claims by the Railroad Company in spite of the fact that after

Federal Control the companies' own legal force was to be employed in respect of such claims. *Contract, Section 9, Subdivision f, Commission,* p. 94.

The settlement of the obligation of the Director General under Section 5, Subdivision E, of the contract, *Commission,* p. 86, hereinabove quoted to restore or replace any property damaged by marine casualty, or to reimburse the companies the value of the property destroyed or the amount of the damage at the time of the loss, applied to damage to and loss of the companies' own property, not to claims *against* the companies, and was satisfied in full by the lump sum payment which included the amount allowed by the Director General in respect of the loss of the *Proteus,* and of the loss of the Barge *Confidence* referred to in the Director General's evidence. *Davis, 14th interrogatory, Commission,* p. 65.

The attitude of the witnesses from the Southern Pacific Company, in answering the interrogatories addressed to them was largely indifferent.

They admitted the settlement, they admitted the exchange of letters between Mr. Spence and Mr. Richardson, they stated that the negotiations were otherwise oral only, but they apparently sedulously avoided a detailed discussion of the Railroad's claim for $54,252,694.57, for which they accepted, as accord and satisfaction, in full settlement the sum of $9,250,000. *Commission,* Evidence of Southern Pacific Company witnesses, —*Kruttschnitt,* pp. 3-8; *Van Deventer,* pp. 41-46; *Neill,* pp. 46-51; *Jungen,* pp. 51-56.

It is significant that there were not any cross-interrogatories addressed to the witnesses by the counsel for the *Proteus*.

IV. The circumstances owing to which it became necessary to take new testimony in this Court are an integral part of the story of this unusual case.

They were as follows:

After the decision holding both vessels to blame in the District Court the cases were sent to a Commissioner to assess the damages.

Here the Director General was guilty of a strange omission. He was not represented by separate counsel on this reference.

Certainly just so soon as the *value* of the *Proteus* came to be proved the interests of the Director General and the Southern Pacific Company diverged, even if, prior to that time, they could have been considered to have been identic.

A single representation of two divergent interests was the subject of criticism by this Court on a very complicated state of facts in the case of *The Beaconsfield*, 158 U. S. 303; and it was there intimated that when a party by reason of representing two interests comes to a point where he occupies an inconsistent position it is his duty to call that fact to the Court's attention. 158 U. S. 309, 310.

The fact that the Director-General was not represented on the record before the commissioner was called to the attention of the counsel for the Southern Pacific

Company by counsel for the Standard Oil Company during the reference. Counsel for the Southern Pacific Company, however, insisted that he represented them both, the Director General and the Southern Pacific Company.*

Thus there was no separate counsel guarding the rights of the Director General, when counsel for the Southern Pacific Company sought on the reference to make the valuation of the *Proteus* as high as possible.

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* During the examination of Mr. Frank S. Martin, one of the witnesses for the Southern Pacific Company, before the Commissioner this colloquy was had.

"The Commissioner: The *Proteus* was a freight boat?

The Witness: The *Proteus* was a freight and passenger boat.

(Fol. 544) Q. Do you know whether or not there has been any settlement as between the Government and the owners of the *Proteus* of the loss of the *Proteus*?

A. No, sir, I do not.

Mr. Burlingham. I will answer for the record, there has been none.

Q. You said you were adjusting values?

A. Not of that one, I did not.

Q. The *Proteus* was in the Railroad Administration, was she not?

A. Yes, the *Proteus* was.

Mr. McGrann: I may say on the record here that the Director General of Railroads is a party to the proceedings of limitation of the *Proteus*.

The Commissioner: And a party to this proceeding now pending here?

Mr. McGrann: A party to the limitation of the liability of of the *Proteus*.

Mr. Burlingham: Yes, the libel was filed, Mr. Commissioner, by the Railroad Administration and the Southern Pacific Company against the *Cushing*. They both join in the libel.

The Commissioner: Were they served with notice of this hearing?

Mr. Burlingham: I represent them." *Record* p. 35.

This was before the settlement and success in this endeavor would have meant that the Railroad Administration would have had to pay an increased amount as the value of the *Proteus* under it contract, without any recourse over, in case the decree as to fault was modified on appeal by holding the *Proteus* solely to blame.

Obviously, it was to the interest of the Director General, not then knowing whether the final result of the litigation would be favorable or unfavorable to him, to have had the value of the *Proteus* fixed at the lowest possible amount.

On November 28, 1922, after the Commissioner's findings had been excepted to and confirmed by the District Court, a final decree was entered in the District Court, holding both vessels to blame and fixing the value of the *Proteus* at $750,000. *Record*, pp. 197 to 216.

On December 19, 1922, the settlement between the Southern Pacific Company and the Director General was made. Of this the Standard Oil Company and its counsel were not aware until after the term of the Circuit Court of Appeals had expired many months later. *Davis, Commission*, p. 64.

On December 27, 1922, an appeal was taken by the Standard Oil Company from the decree of the District Court. *Record*, p. 217.

On January 27, 1923, the Southern Pacific Company appealed against the valuation of the *Proteus*. *Record*, p. 219.

There was not any appeal taken by the Director General although he was a party to the case, and liable for the negligence of his servants who were operating the *Proteus*.

The formal decree and judgment of the Circuit Court of Appeals, whereby the decision below was affirmed on the merits and the valuation of the *Proteus* as of August 19, 1918, the date of her loss, was increased from $750,000 to $1,225,000, was entered on July 23, 1923. *Record*, p. 231.

Thus the settlement between the Southern Pacific Company and the Railroad Administration was made *between* the time of the final decree of the District Court in November, 1922, and the final decree of the Circuit Court of Appeals in July, 1923.

It seemed curious at that time to counsel for the *Standard Oil Company* and the *Cushing*, who were unaware of this settlement, that the Director General did not appeal on behalf of the Railroad Administration from the District Court decree.

The Director General may have been under the impression that he had finished with the case entirely after he had settled his liabilities to the Southern Pacific Company for the loss of the *Proteus*, for an amount apparently somewhat in excess of the valuation found in the decision of the District Court.

Of course, it was not true, that the Director General could, at this stage of an Admiralty case, commence to disregard the proceedings, because on the appeal to the Circuit Court of Appeals there would be a new trial in that Court.

In that new trial there might very possibly have been, and, indeed, according to the contention of the Standard Oil Company, there should have been, a modification of the decree below, by which the Standard Oil Company would have been exonerated from all liability, and the Director General would have been held solely to blame for all the damages caused by the collision and would have been liable to the Southern Pacific Company for the increased award in respect of the *Proteus*.

It is to be remembered that the Southern Pacific Company had been paid in full for the loss of the *Proteus* by the Railroad Administration before it took its appeal which was pointed solely to the valuation fixed for the *Proteus for which they had already been paid. Notice of Appeal by Southern Pacific Company and its Assignments of Error.** *Record*, pp. 218, 219.

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* The Notice of Appeal on behalf of the Southern Pacific Company and its assignment of errors were as follows:

"NOTICE OF APPEAL.

"Sirs: Take notice that the claimant, Southern Pacific Company, hereby appeals to the United States Circuit Court of Appeals for the Second District, from the final decree entered herein November 28, 1922, in so far as said decree fixes the value of

The Southern Pacific Company was not liable for the collision because the *Proteus* was out of its possession and control, and the negligence for which she was condemned was negligence of the Director General's employees for which the Southern Pacific Company was not even remotely liable.

By not appealing, the Director General, thus, acquiesced in the finding of the District Court both as to value and liability.

It is confidently submitted, that, as he has not challenged the District Court's decision, the Director General cannot recover more than that decision allowed for the value of the *Proteus*. Cf. *The Beaconsfield*, 158 U. S. 303, 310.

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the SS. *Proteus* as of August 19, 1918, at the sum of $750,000.

"Dated, New York, January 27, 1923.

"Yours, etc., Burlingham, Veeder, Masten & Fearey,
Proctors for Claimant Southern Pacific Company."

Record p. 218.

"ASSIGNMENTS OF ERROR.

"Southern Pacific Company, claimant herein, hereby assigns error in the decision and decrees of this court in so far as they relate to the valuation of the *SS. Proteus*, as follows:

"1. In that the Court overruled claimant's exceptions to the report of the Commissioner filed herein April 22, 1922.

"2. In that the Court found the value of the *SS. Proteus* as of August 19, 1918, to have been $750,000.

"3. In that the Court did not fix the value of the *SS. Proteus* as of August 19, 1918, at the sum of $1,225,000 as established by the preponderance of the evidence.

"BURLINGHAM, VEEDER, MASTEN & FEAREY,
Proctors for Claimant Southern Pacific Company."

Record p. 219.

If he paid more to the Southern Pacific Company, he should be out of pocket the difference.

Thus the Director General took a risk, which was rather unusual for a Government Officer, both in not appealing on the merits, and in making the settlement between the decree of the District Court and the expiration of the time of the opposing party to appeal therefrom. It was only a bit of good fortune for him in this particular case that the decree was affirmed so far as his liability was concerned.

Apparently it is the fact that the Director General did not have a representation separate from the Southern Pacific Company which has led to the necessity of asking this Court for leave to take testimony here, and has resulted in the curious situation developed by the testimony taken. Cf. *The Beaconsfield,* 158 U. S. 303, at 309-310.

Whatever may have been his reason for lack of active interest in the case since the District Court decision, the Director General has now come into it again in this Court, still represented by the same counsel as the Southern Pacific Company.

V. In his brief in opposition to the motion to take new evidence in this Court, counsel for the Southern Pacific Company seemed to contend that the fact that the Federal Government took possession of the Railroads in exercising its right of eminent domain in some way changed the legal results of such a possession.

It is obvious that the *process* followed in securing possession did not make any difference in the legal results involved in the possession.

The exercise of eminent domain under War Powers by the President in seizing the railroads in pursuance of the Acts of Congress was, in effect, a summary proceeding in condemnation, with a provision that possession only should be taken and that just compensation should be subsequently arranged.

As it was only a taking of possession, not a taking of title, the legal situation resulting was not in any way different from the situation which would have existed if possession had been taken in pursuance of a contract voluntarily made by the railroads.

The resultant legal situation was this:

The Southern Pacific Company after the taking by the Government had no control whatever over the *Proteus,* no personal liability for the acts of those navigating her, and no interest in her except the interest which the owner of any vessel has when she is under a charter of demise; i. e., as owner, it was entitled to a compensation for her use and an indemnity in case of her being lost.

The Railroad Administration, whilst in possession of the steamship *Proteus,* was a hiring bailee in the position of a demise charterer who has assumed the duty of manning, provisioning, victualling and operating a vessel.

Indeed, the Railroad Administration took the position on the pleadings that it was, in effect, a demise charterer, and as such entitled to limit liability, as will be hereinafter noted in greater detail. *Joint petition of Southern Pacific Company and Director General, Article 3. Record,* pp. 10, 11.

When dealing with a charter of demise, this court said in *The Barnstable,* 181 U. S. 464 (1900) at page 468:

> "As the charterers hired the *Barnstable* for a definite period, and agreed to select their own officers and crew, and pay all the running current expenses of the vessel, including the expense of loading and discharging cargoes—the owners only assuming to deliver the vessel to the charterers in good order and condition, and to maintain her in an efficient state during the existence of the charter party, there can be no doubt that, irrespective of any special provision to the contrary, the charterers would be liable for the consequences of negligence in her navigation, and would be bound to return the steamer to her owners free from any lien of their own contracting, or caused by their own fault. *Thorp* v. *Hammond,* 12 Wall. 408; *Williams* v. *Hays,* 143 N. Y. 442; *Scott* v. *Scott,* 2 Starkie 386; *Webster* v. *Disharoom,* 64 Fed. Rep. 143; *Galzoni* v. *Tyler,* 64 Cal. 334, 386.
>
> "This, indeed, is but the application to charter parties of the ordinary law of bailment, which requires that the bailee return the property to the owner in the condition in which it was received,

> less the ordinary results of wear and tear, and such injuries as are caused by a peril of the sea, or inevitable accident. *Coupe Co.* v. *Maddick,* (1891) 2 Q. B. 413; *Sturm* v. *Boker,* 150 U. S. 312; Story on Bailments, secs. 25 to 32."

Under a demise charter, as was held in the case just cited, it is the charterer, as the employer of the persons who operate the vessel, that is responsible for a collision caused by the negligence of such persons.

As is above noted, the Southern Pacific Company, itself was not the employer of the master and officers of the *Proteus,* whose negligence contributed to the collision, and would not have been personally liable in any way whatsoever to the Standard Oil Company.

Furthermore it could not have been held liable even indirectly by direct suit against, and the arrest of the *Proteus* because a proceeding *in rem* was forbidden by the terms of the President's Proclamation and by Section 10 of the Federal Control Act. Hence it is doubtful whether it really needed to file any limitation of liability petition, for as mere owner of the *Proteus* it was not even threatened under the existing circumstances.

A further aspect of the legal situation is that the Southern Pacific Company, as the owner of the *Proteus,* had at the commencement of the action, a right to recover the value of the *Proteus* not only from the Standard Oil Company but also from the Director General, whose

concurrent negligence had caused her loss. *Clark* v. *United States*, 95 U. S. 539; *Sun Printing & Pub. Ass.* v. *Moore*, 183 U. S. 642.

It is true that in connection with its relation to the Railroad Administration the Southern Pacific Company did not have to rely solely on its tort action, because by contract the Director General had agreed to replace or pay for any vessel that was lost by collision. But that does not alter the fact that the Southern Pacific Company could have joined the Standard Oil Company and the Director General as respondents in a collision suit if it had elected to follow that procedure.

In the *evidence taken in this Court* it is now shown that the bailor-owner, the Southern Pacific Company, has settled with the bailee-charterer—the Director General—and has received satisfaction for and given release in respect of damages suffered by it owing to the loss of the *Proteus*.

That release did not contain any reservation of rights against the Standard Oil Company or other parties, and, therefore, under well settled principles the Southern Pacific Company, having received satisfaction for the loss it suffered, has had its claim extinguished as against all the world, and is barred from seeking any further recovery of any kind from any body. Its cause of action for damages for the loss of the *Proteus* is dead.

For when two tort-feasors by their concurrent negligence have caused an injury to a third person, they are

jointly and severally liable to him under the salutary doctrine laid down in the overwhelming majority of the courts of this country.*

It is true that in Pennsylvania and in England to constitute a joint tort you must find the tort-feasors acting in concert.**

But that is not the law in this Court.

The Atlas, 93 U. S. 302, at page 318;
Boyer v. *Sturgis*, 24 How. 122.

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* *The Atlas*, 93 U. S. 302, 318 (1876)—concurrent fault of two vessels;
Colegrove v. *N. Y. & N. H. R. R.* (1859) 20 N. Y. 492—concurrent negligence of two railroads;
Carlton v. *Boudar* (1916) 118 Va. 521—concurrent negligence of carrier and a third person;
Walton, Witten & Graham v. *Miller* (1909) 109 Va. 210—concurrent negligence of independent contractor and railroad;
Feneff v. *Bos. & Me. R.* (1907) 196 Mass. 575—concurrent negligence of two railroads;
Cuddy v. *Horn* (1881) 46 Mich. 596—concurrent negligence of two steamers;
Drown v. *New Eng. Tel. & Tel. Co.* (1907) 80 Vt. 1—concurrent negligence of independent companies;
Slater v. *Mersereau* (1876) 64 N. Y. 138—concurrent negligence of two contractors;
Corey v. *Havener* (1902) 182 Mass. 250—concurrent negligence of two drivers of separate motor-tricycles;
McClellan v. *St. Paul M. & M. Ry.* (1894) 58 Minn. 104—two negligently caused fires;
Reynolds v. *Kansas City* (1914) 180 Mo. App. 138—concurrent negligence of City and traction company;
City of Louisville v. *Heitkemper's Adm'x* (1916) 169 Ky. 167—coucurrent negligence of City and third person.

** *Howard* v. *Union Traction Co.* (1900) 195 Pa. St. 391;
Thompson v. *London County Council* (1899) 1 Q. B. 840;
Sadler v. *Great West. Ry. Co.* (1896) A. C. 450;
The Koursk (1924) 40 Times L. R. 399.

Indeed, in *The Ira M. Hedges,* 218 U. S. 264 (1910), Mr. Justice Holmes in dealing with the question of contribution between tort-feasors in Admiralty referred to a collision whereby an innocent barge was damaged in collision due to the negligence of two tugs as the "*joint tort*" of the two tugs.

There is not any doubt whatever that under the law as laid down by this Court, the Southern Pacific Company as the innocent owner of the *Proteus* could have sued either the Standard Oil Company or the Director General for the negligent sinking of the *Proteus* and recovered full damages from either tort-feasor, or it could have sued them jointly and recovered a moiety of its damages from each in the first instance, with a right over against the other tort-feasor for any deficiency not paid by the respondent against whom execution first issued.

The Beaconsfield, 158 U. S. 303, 307.
The Atlas, 93 U. S. 302, 315 (1877).
The Alabama & The Gamecock, 92 U. S. 695, 697 (1875).

But once it had received from one of the tort-feasors full satisfaction for its loss, as it has done here, it could not pursue the other tort-feasor for further damages for the excellent reason that it would not have any cause of action left.

The Beaconsfield, 158 U. S. 303, 307.
The Atlas, 93 U. S. 302, 315.

Lovejoy v. *Murray*, 3 Wall. 1, 17.
Jennings v. *Dolan*, 29 Fed. 861.
Albright v. *McTighe*, 49 Fed. 817.
U. S. v. *Murphy*, 15 Fed. 589 (1883).
1 Williston Contracts, Sec. 334, 338a.
26 Harv. L. R., 658.
34 Harv. L. R., 442.
12 Harv. L. R. 66.
Seither v. *Philadelphia Transaction Co.*, 125 Pa. St. 397.

An unconditional release of one joint tort-feasor releases all.

Spiess v. *Sommarstrom &c. Co.*, 272 Fed. 109.
Gold v. *Boston &c. Co.*, 244 Mass. 144.
Savage v. *Stevens*, 128 Mass. 255.

Except as between the two parties concerned in the collision,—and of course subject to statutory limitations such as the Harter Act which is not involved in the present aspect of this case—the Common law rules regarding joint tort-feasors apply in Admiralty.

The Atlas, 93 U. S. 302, 317.
The Beaconsfield, 158 U. S. 303.

It is clear, therefore, that the Southern Pacific is out of the case, and has not any cause of action left and hence has not any right of recovery against the Standard Oil Company or the *Cushing*.

VI. That leaves the equities of contribution to be worked out between the Director General and the Standard Oil Company.

The right of contribution in such a case as this "belongs to the substantive law of the admiralty."

> *The Ira M. Hedges,* 218 U. S. 264, 270.
> *Erie R. R. Co.* v. *Erie & Western Transportation Co.,* 204 U. S. 220.

It is quite true that the pleadings in the case do not show the alignment of the parties properly or portray rightly the existing legal situation.

The pleadings lie thus:

In the petition filed by the *Standard Oil Company, Record,* pp. 1 to 6, it is recited the libel *in rem* had been filed against the steamship *Cushing* in the District Court of the United States for the Southern District of New York *by The Southern Pacific Company,* as owner of the *Proteus. Record,* p. 4.

An answer was filed to this petition jointly by the *Southern Pacific Company,* as owner, and by the *Director General of Railroads. Record,* pp. 6 to 9.

The Southern Pacific Company, as owner of the *Proteus,* and *Director General of Railroads,* also filed a petition for limitation of liability and in that petition, Paragraph 3, *Record,* p. 10, it is stated that the Director General was in effect a demise charterer of the *Proteus,* so as to bring him within the meaning of Section 4286 of the Revised Statutes which read as follows:

"The charterer of any vessel, in case he shall man, victual, and nagivate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this title (R. S. 4131-4305) relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

The Paragraph of the petition referred to alleges:

"Third. By said proclamation of December 26, 1917, the President took possession and assumed control at 12 o'clock noon December 28, 1917, of the Petitioner Southern Pacific Company and its property, including its system of coastwise transportation known as Southern Pacific Company (Atlantic Steamship Lines) of which said steamship *Proteus* was a part; and said steamship was thereafter and until her loss as hereinafter set forth in the possession and control of and was operated and utilized by said William G. McAdoo as Director General of Railroads, who manned, victualled and navigated said vessel at his own expense and by his own procurement, and was a charterer thereof within the meaning of Section 4286 of the Revised Statutes. The principal office and place of business of the Director General of Railroads is in the City of Washington, District of Columbia. On January 11, 1919, the petitioner, Walker D. Hines, succeeded said William G. McAdoo as Director General of Railroads and has continued to be and is now Director General of Railroads." *Record,* pp. 10-11.

To these allegations of the petition, the Standard Oil Company filed an answer denying knowledge of the matters alleged. *Record,* pp. 15-18.

The allegations of the third article of the petition were duly established by proof during the trial, and have been confirmed by the proofs taken in this Court.

By order of the District Court, as above stated, on the 6th day of November, 1922, the cases were consolidated.

Accordingly, the pleadings are now locked together, in effect, just as if they consisted of a libel and cross-libel, with the owner of the *Cushing* on the one side, and the owner of the *Proteus* and the Director General, as her demise-charterer, on the other side.

As a matter of fact, it is submitted, for the reasons above given the line-up of the parties which would have reflected the real situation would have been as follows:

The Southern Pacific Company, instead of attempting to limit its liability, a relief which it apparently did not need, should have filed a libel against the *Cushing* or the Standard Oil Company, *and* the Director General of Railroads, claiming from them both the damages it had suffered by the loss of the *Proteus.*

That would have reflected the real legal situation and would have made it obvious on the face of the pleadings, which the present record does not.

It is settled law that there is a new trial in admiralty on appeal to the Circuit Court of Appeals or on *certiorari* to this Court.

Reid v. *Fargo*, 241 U. S. 544 (1916).
Watts, etc. v. *Unione Austriaca*, 248 U. S. 9 (1918).
The John Twohy, 255 U. S. 77 (1921).

Mr. Justice Brandeis said in *Watts, etc.* v. *Unione Austriaca*, 248 U. S. 9, at page 21:

"This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. *Butler* v. *Eaton*, 141 U. S. 240; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503, 506. And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below. *United States* v. *Hamburg-Amerikanishe Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, 478; *Berry* v. *Davis*, 242 U. S. 468; *Crozier* v. *Krupp*, 224 U. S. 290, 302; *Jones* v. *Montague*, 194 U. S. 147; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 120; *Mills* v. *Green*, 159 U. S. 651; *The Schooner Rachel* v. *United States*, 6 Cranch, 329; *United States* v. *The Schooner Peggy*, 1 Cranch, 103, 109-110. In the case at bar the rule is the more insistent, because, in admiralty, cases are tried *de novo* on appeal. *Yeaton* v. *United States*, 5 Cranch, 281; *Irvine* v. *The Hesper*, 122 U. S. 256, 266; *Reid* v. *American Express Co.*, 241 U. S. 544.

"Since the certiorari was granted, the relation of the parties to the court has changed radically. • • •"

We must look, therefore, at the facts, as now developed on the new evidence taken in this court.

That evidence shows, as has been stated, the situation of a settlement by the bailee charterer,—the Director General,—with the bailor owner,—the Southern Pacific Company,—and a release from that company in full satisfaction of all its claims against the bailee then existing or that might thereafter arise in connection with the use of the companies' property during the period of Federal control or out of the contract of February 19, 1919.

It is, apparently, usually stated that the principal basis of a bailee's right to sue a third party is the bailee's liability over to the bailor.

An occasion when this question was under discussion in this Court was the case of *Pendleton* v. *Benner Line*, 246 U. S. 353 (1918), in which a voyage charterer the Benner Line, had held itself out as a common carrier, received consignment of the goods, fixed and collected the freight, and issued shippers bills of lading which were signed by the master or agents of the vessel.

In spite of the fact that the master or agents of the vessel had signed the bills of lading, it was held that the Benner Line, as voyage charterer, was sufficiently the bailee of the goods under its contract as common carrier, to maintain an action against the unseaworthy carrying vessel to recover for the loss of the goods.

In that case Mr. Justice Holmes said in regard to this theory of the bailee's right of action against third parties 246 U. S. at page 356:

> "* * * Whatever may be the inadequacy, in history or theory, of the reason as applied to torts, it applies with real force to contract relations like those in this case. * * *"

Here the Director General had a contract of indemnity with the Southern Pacific Company and in view of the doctrine of contribution between tort feasors in collision cases,* the bailee's situation in this case is removed from any zone of perplexity either of theory or practice.

There is not any subrogation involved in a situation like this, as was pointed out by the Circuit Court of Appeals for the Second Circuit in *The Jersey City,* 51 Fed. 527 (1892). There the owner of a tug, which was the bailee of a tow, sued *The Jersey City* for damaging its tow. A subrogation agreement had been secured from the owner of the tow.

In that case, Judge Wallace, writing the opinion of the Court, 51 Fed. 527, said at page 528:

> "The question whether the libelant became subrogated to the claim of the Delaware & Hudson Canal Company does not affect the right of the libelant to recover. It has been unnecessarily introduced into the controversy. The libelant was a bailee of the property injured. * * *"

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* *Erie R. R.* v. *Erie & W. Transp. Co.,* 204 U. S. 220;
The Ira M. Hedges, 218 U. S. 269 (1910);
The Thekla, decided by this Court Nov. 21, 1924;
The Hudson 15 Fed. 162 (1883), which contains a learned discussion of the whole doctrine by Judge Addison Brown.

As a result in that case the Cornell Steamboat Company, libelant, was allowed to recover against the wrongdoer, the steamship *Jersey City*, as damages *the amount which it had paid to the owner of its tow in settlement of the damages received by the latter.*

In this connection, it might be of value to observe that in the case of a total loss by collision the value of the vessel at the time of the collision is the measure of the recovery and future profits are not taken into consideration. The theory, apparently, is that such profits are compensated for by the legal rate of interest which runs on the amount allowed as the vessel's value.*

The Umbria, 166 U. S. 404, 421 (1897).
The George W. Roby, 111 Fed. 601, 615 (C. C. A., 6th Cir. 1901).
The Fontana, 119 Fed. 853, 961 (C. C. A., 6th Cir. 1903).
The Menominee, 125 Fed. 530 (1903).
The Havilah, 39 Fed. 333 (1889).

In all the cases just cited, suit was brought by the owners, but the question of the damages on the present state of this record would not involve a different principle in the case of the Director General than in those cases. The fact that subsequent profits cannot be proved seems to be based on the uncertainty of sea ventures, which would prevent it being proved with reasonable certainty that the lost vessel could have earned the prospective

* Indeed, that was the thought behind Judge Mack's remark at the end of his opinion confirming the commissioner's report, where he spoke of the prorating of the interest between the Southern Pacific Company and the Director General. *Record*, p. 196.

profits in the event she had not been lost. Other collisions or disasters might have prevented her further profitable use.

Consequently the value of the *Proteus* at the time of her loss, with interest until paid, was the proper measure of damages recoverable for the loss of the *Proteus*.

VII. Now, therefore, that the Southern Pacific Company has been cut out of the case by the satisfaction of its claim, the only question left is what allowance the Director General should have in the collision adjustment in respect of the *Proteus*.

The Director General has not made or proved any claim for any damages personal to him as bailee.*

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* The following are the recitals of the final decree in the District Court:

> "And it appearing that the damages sustained by the Southern Pacific Company and James C. Davis, Director General of Railroads, as agent, as owner and charterer respectively of the steamship *Proteus* and as bailee of the effects of passengers, master, officers and crew of the *Proteus* and as bailee of certain cargo amount to the sum of $830,412.19 together with interest to November 28, 1922 in the sum of $213,078.10 and costs as taxed in the sum of $365.75 making a total of $1,043,856.04.
>
> "And it appearing that the total damages arising from the said collision amount to the sum of $1,686,814.30 which sum includes interest to November 28, 1922 and costs as taxed it is further Ordered, adjudged and decreed that the Southern Pacific Company (Fol. 898) and James C. Davis, Director General of Railroads, as agent, recover from the petitioner, Standard Oil Company (New Jersey) with interest until paid the sum of two hundred thousand, four hundred forty-eight and 89/100 dollars ($200,448.89) being one-half of the difference between the amount of their damages as aforesaid including interest to November 28, 1922, and costs and damages sustained by the Standard Oil Company (New Jersey) as owner of the *Cushing*, with interest to November 28th, 1922 and costs, including the amount paid by the Standard Oil Company (New Jersey) to the cargo claimants as aforesaid, * * *"

Record, p. 216.

The Director General did not appeal from this decree and, therefore, we submit, cannot be allowed more than the District Court allowed as the value of the *Proteus* because he did not appeal from that valuation. Cf. *The Beaconsfield,* 158 U. S. 303, 310.

If we are wrong as to this, certainly there is not any question but that the largest claim, which he can now possibly make, is for reimbursement to the extent of the amount which he had paid to his bailor in settlement of his contract obligation to make the bailor whole.

To allow him more would be to give him an excess as to which he has not made out any right.

It would seem perfectly clear, both from the history of bailment and from the common sense of the situation, that the charter-bailee cannot under such circumstances as these be allowed, in a collision adjustment with a third party whose negligence contributed to the loss, of any greater amount than he has actually paid to his owner-bailor.

It would follow, therefore, in this case, that as the Railroad Administration has settled with the Southern Pacific Company for the value of the *Proteus,* the greatest amount that can be allowed to the Railroad Administration in the collision adjustment is the amount which it has paid to the Southern Pacific Company on its settlement. For that represents the agreed damage suffered by the thing bailed whilst in the bailee's possession.

Cf. Vermilye v. *Adams Express Co.*, 21 Wall. 138, 147.
The Jersey City, 51 Fed. 527 (1892).

By such an allowance as is suggested all the parties would have received full compensation—the Southern Pacific Company by its agreement to the settlement as evidenced by its release, and the Railroad Administration by receiving an allowance equivalent to the money paid by it for the loss of the *Proteus* to the Southern Pacific Company.

If the Court does not consider that the amount of the payment is sufficiently clearly proved by the evidence of the Director General of Railroads, that amount can be determined by a reference to a master as is the common practice in admiralty causes, when, after the merits have been decided, the damages have to be determined.

It should be noted that in dealing with the valuation of the *Proteus* in this point we are not discussing the question of a direct recovery by the Director General in any way whatsoever. We are dealing merely with the amount which should properly be *credited* in the collision adjustment, on the basis of both to blame, in favor of the Railroad Administration as against the Standard Oil Company.

It is submitted, therefore, that this Court should deal with the parties before it in this case as follows:

To the Standard Oil Company, it should say:

> "You have been guilty of a wrong for which you have been held partly to blame and which caused the loss of the *Proteus.* The question is, what will constitute under the doctrine of admiralty law of cross-liabilities a compensation to the persons damaged by such loss."

To the Southern Pacific Company, it should say:

> "You have been damaged by the loss of the steamship *Proteus,* but have accepted from the Director General of Railroads, by whom you were indemnified under a contract, a sum of money equal to the value of the *Proteus* and have released your claim against him without reservation. You have therefore been compensated for her loss."

To the Director General of Railroads, it should say:

> "You did not appeal from the decree of the District Court and hence you cannot recover more than that decree allowed."

Or it might say:

> "You have paid a certain sum to the Southern Pacific Company for the loss of the *Proteus* which is the measure of your damage in the collision and you should not be allowed a credit of more than this sum in the collision adjustment. If you are allowed a credit of this sum in the collision adjustment, you will have been made whole."

Such a disposition of the case would be in accordance with the authorities as applied to the facts newly brought out; it would be just to the parties; it would be in accordance with common-sense.

It is submitted, that however complicated the processes of approach to a decision may be, when we reach a point where, as here, law, justice and common-sense converge, it is clear that we have the solution of the controversy.

SECOND POINT.

THE RULE OF DAMAGE APPLIED BY THE CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT IS ERRONEOUS IN THAT IT IS BASED ON AN ARBITRARY FORMULA, THE TWO FACTORS OF WHICH ARE A SPECULATIVE REPRODUCTION COST, AND AN UNCERTAIN DEPRECIATION RATE; AND WHICH OPERATES TO EXCLUDE OTHER MATERIAL FACTORS IN ARRIVING AT FAIR VALUATION. THE PROPER RULE IS THAT ADOPTED BY THE DISTRICT COURT, AND BY THE COMMISSIONER, WHEREBY, IN THE ABSENCE OF A PROVABLE MARKET VALUE, ALL OTHER RELEVANT FACTS ARE CONSIDERED IN DETERMINING THE MEASURE OF THE LOSS.

I. THERE WAS NOT ANY MARKET VALUE FOR THE *Proteus* AT THE TIME OF HER LOSS.

It is conceded that there was not any "market value" for (American) vessels at the time of the loss of the *Proteus* (August 19, 1918).

The Commissioner before whom the valuation first came for determination found:

> "* * * The market for all such ships was closed during the war and in August, 1918, the *Proteus* had no market value. * * *" *Record*, p. 183.

The District Court also found:

> "In August, 1918, practically all American ships of the size and type of the *Proteus* were

> under requisition, and the market for all such ships was for all substantial purposes closed, during the war. * * *'' *Record*, p. 192.

In the case of *Gulf Refining Company* vs. *The United States*, No. 34120 Court of Claims, decided October 29, 1923, 58 Ct. Cl. 559, the Court found among other facts as follows at page 566:

> ''X. On and after October 12, 1917, and during the time when plaintiff's vessels were held by the United States, practically all tank steamships in the world were commandeered, seized, or chartered by the allied belligerent nations, or by the United States, and practically all available shipyards, and shipbuilding facilities were similarly commandeered or seized, so that during the period when plaintiff's vessels were held by the United States, it was not possible for plaintiff to replace the same by purchase or hire in the open market or by contracts for new construction.''

It appears also from the facts as found that the vessels were held by the United States from dates varying between October 16, 1917 until June 14, 1919 (including the date of loss of the *Proteus*).

[According to the Shipping Board's letter of September 27, 1917, which is quoted by the Court, ''the Shipping Board finally determined upon $175. per deadweight ton as the average value for requisitioned tonnage, * * *'', which has a direct bearing on the value of *Proteus*, post, p. 67].

The Circuit Court of Appeals, while stating that the measure of the damage ordinarily would be the ''market

value" of the vessel, also held that during the period of Federal control of the *Proteus* "the owner could not have sold her or would have to sell her subject to control by the Government", and, although intimating that on her loss, if the owner had then been free to sell the *Proteus,* there would have been a market, nevertheless, the Court assumed: "There was no market value in August 1918", and proceeded to fix the value on that assumption. *Record,* pp. 228-229.

The burden of proof to establish the loss rested on the *Proteus* interests (Southern Pacific Company and Director General of Railroads). *The Conqueror,* 166 U. S. 110. That burden of proof meant the establishment of a monetary loss, and, "the amount of loss is as much to be proved as the fact of loss." *Sedgwick on Damages,* 9th Ed. Vol. I, p. 181. Recognizing the impossibility of establishing a "market value" in the sense of a sale value of the *Proteus,* it was sought to establish a value for the *Proteus* as a measure of the loss which was based, as the Commissioner stated, "principally upon the testimony of experts with respect to what, in their opinion, it would have cost to reproduce the *Proteus* in August, 1918, * * *". *Record,* p. 183. That evidence was met not only by testimony of other experts in opposition, but by the introduction of testimony bearing on all other relevant factors making up the value of the vessel. *Record,* pp. 183-184.

At the inception of the case on the record, therefore, it becomes necessary to approach the question raised here with the premise that the ordinary test of ascertainment of the measure of damage of a vessel totally lost, namely, "market value", is absent.

II. The Circuit Court of Appeals based its valuation of the *Proteus* squarely and exclusively on the reproduction and depreciation theory.

It was stated by the Circuit Court of Appeals that, "these special circumstances invoke the rule of damages of cost of production less depreciation", the special circumstances being the absence of a market value and the impossibility of having a vessel constructed at the time of the loss. *Record,* p. 229. Although the court used the word "production", the text of its opinion, and its conclusions, show that it meant the cost of present construction of a new vessel, and not the original cost of producing the *Proteus.* In other words, the word "production" meant "*re*production".

By application of that theory, and by applying the somewhat arbitrary figures to represent the two factors, "cost of reproduction" and "depreciation", a result was obtained as representing the measure of the loss in the sum of $1,225,000, which increased the valuation as fixed by the Commissioner and confirmed by the District Court, to almost double the amount that had been awarded as the measure of the damage.

That conclusion, as has been mentioned previously, was substantially an exclusive acceptance of the statement of only one of the several witnesses who testified, this witness having stated in answer to the question as to the basis of his valuation in that amount ($1,225,000) as follows:

> "There being no sales to guide me, I took the estimated cost of the reproducing a vessel of the

> same size and description as the *Proteus* in August, 1918; and the estimated cost was $1,750,000. From that cost I deducted two and one-half per cent for eighteen years' depreciation, which is $525,000, leaving a value of ($1,255,000) $1,225,000."* *Record*, p. 31.

An analysis of the two factors entering into this calculation shows the fallacy of the result.

III. THE FACTOR OF "COST OF REPRODUCTION" WHICH WAS TAKEN TO BE $1,750,000, IS HIGHLY SPECULATIVE AND EXCESSIVE.

Our contention is that "cost of reproduction" under the circumstances here stands substantially on the same footing as "market value". In the latter case, and in the sense of a market value for *sale* purposes, it has been conceded, and, in fact, found by the courts which passed on this particular case, that the measure of loss was not ascertainable by application of the market value theory for the reason that there was not any market for the *Proteus* at the time of her loss, and there could not have been any prior to March 1, 1920, when Federal control ceased. Also, it is equally true that there could not have been a replacement by new construction, that is, a *reproduction* of the *Proteus* at this time, because of the

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* This figure is erroneously printed in the record, where it appears as $1,255,000. The original record in the District Court and in the Circuit Court of Appeals contains a correct printing of the figure in the sum of "$1,225,000". It is also clear from the question which contains the correct figure, $1,225,000, as well as by subtracting the two other figures given by the witness ($1,750,000 and $525,000) that the figure should be $1,225,000, as it appears in the original records.

impossibility of having a vessel built during this period, at least for a private owner. This condition with respect to the impossibility of reconstruction, is established by the testimony of the witness produced by the respondents for the sole purpose of obtaining an "estimate" of what it might have cost to reconstruct the *Proteus* at that time, if it had been possible to do so. That witness, Mr. Palen, frankly admitted that his company could not have done the work of reconstruction, for, as he said, "our plant was entirely under the control of the Government as to its output." The Commissioner found that "such was the case generally"; and, it is a well-known fact that all of the ship-construction works were operating solely for the Government at this time, and were forbidden to undertake any contract not governmental in its nature. *Ante*, p. 61.

Despite that admitted condition, the respondents insisted in advancing the "reproduction" theory exclusively, and Mr. Palen made some calculations which purported to represent what it would have cost to build a vessel like the *Proteus* at the works of his company (Newport News Shipbuilding & Drydock Company) where the *Proteus* had been originally constructed in 1900, giving as his figure the sum of about $1,750,000. *Record*, p. 129.

The original cost of the *Proteus* in 1900 was $540,400, *Record*, p. 130; not $557,600 as was assumed by the Circuit Court of Appeals. *Record*, p. 230.

Mr. Palen's estimate of the reproduction cost as of the date of loss is, therefore, considerably more than three (3) times the actual cost of the vessel originally.

It may be remarked that Mr. Palen gave the actual cost as $1,494,000, but he added $261,450 for *profits.* It seems that the profit on the original construction was only $33,250, so that his estimated profit on the new construction as of the date of loss was eight (8) times as much as the profit made on the original construction. It is also seventeen and a half (17½) per cent of the total cost including the heavy "overhead" and operating expenses of $268,000 in Mr. Palen's estimate. The item of profit alone in the estimate represents at least seven and a half (7½) per cent more than the ordinary Government contracts prevailing at the time of "cost plus ten (10) per cent." The estimates for high cost of material and labor, as given by Mr. Palen, seem equally inflated. *Record,* pp. 127, 129.

It is to be borne in mind that Mr. Palen was not making an estimate with a view to actually reconstructing the *Proteus.* Indeed, he so admitted in his testimony. Obviously, the object of the respondents was to obtain testimony establishing a high (it may be said prohibitive) cost of reproduction, speculative although it was. If it had been possible to replace the *Proteus,* and if it had been intended by her owner to replace the vessel, perhaps the testimony might have had some weight; but, it was at best a gesture, and was not in any sense a real, certainly not a competitive, bid for replacement.

As appears from the testimony of other witnesses who were in a position to know, the tendency of shipbuilding companies at that time in giving such estimates of cost of reconstruction, was to state a price in a very much higher figure than the actual cost. *Record,* pp. 90, 119, 187.

The estimate of Mr. Palen compares unfavorably with actual cost of construction of Shipping Board vessels, which it was said by one of the respondents' witnesses would average from $30 to $40 more than $180 a gross ton, or about $220 per deadweight ton. *Record,* p. 57. If the latter figure should be accepted, the reproduction cost of the *Proteus* at war period prices might have been as much as $847,000. *Cf.* letter quoted *ante,* p. 61.

Another witness, Mr. Morrell, who testified on behalf of the petitioner, gave the reconstruction cost of "tankers" as from $190 to $195 per deadweight ton. The cost of such a vessel (oil tanker) is ten to fifteen per cent more than an ordinary freight carrying vessel. *Record,* p. 70. Even making an allowance for a possible additional cost of construction of a combined passenger and freight carrying vessel, the probable reproduction cost of the *Proteus* at this period (assuming that it could have been rebuilt), would be less than $800,000, the deadweight capacity of that vessel being less than 4,000 tons. *Record,* pp. 28, 59, 114. The exact deadweight tonnage was stated as 3,800 tons. *Record,* p. 59.

It is not our purpose to contend that prices of material and labor were not on a high scale at the time of the loss of the *Proteus;* but, it also cannot be denied that such abnormal prices as prevailed during the war period were transitory, even for vessel property, and that vessel values dropped rapidly before the time when the *Proteus* would have been relinquished from Federal control and redelivered to her owner, namely, March 1, 1920. Indeed, in the case of *Galveston Electric Co.* vs. *City of Galveston,* 272 Fed. 147, p. 157, it was found that the

average price of commodities on January 1, 1920, was only about a third more than the prices prevailing on August 1, 1914.

One of the witnesses for the respondents, Mr. Raymond, seems to have recognized the rapid drop in vessel values, as he was of the opinion that the sum of $100 per ton deadweight would have been a fair sale price ("market value") as of early 1920, prior to the time that the *Proteus* would have been redelivered to her owner. Indeed, it seems that Mr. Raymond had advocated the sale of Shipping Board vessels at that price, and he had predicted that values would drop even lower. According to him the actual demand for vessels "after the armistice and up until say 1920" was only from new companies. *Record,* pp. 61, 68.

The foregoing suggestions indicate that Mr. Palen's so-called "estimate" was not only in its nature speculative insofar as it bears on the present case, but it was essentially based on highly transitory and inflated values.

It is submitted that one of the two factors on which the conclusions of the Circuit Court of Appeals are based, is not justifiable, and the adoption of the excessive figure ($1,750,000) to represent that factor was productive of a result which cannot fairly represent a measure of the damage.

IV. THE SECOND FACTOR, THAT OF "DEPRECIATION", WHICH THE CIRCUIT COURT OF APPEALS ASSUMED TO BE TWO AND A HALF (2½) PER CENT. PER YEAR, WAS ALSO UNREASONABLE AND UNDULY ADVANTAGEOUS TO THE RESPONDENTS, AND ITS ACCEPTANCE GREATLY ENHANCED THE RESULT OBTAINED BY THE FORMULA, AND TO THE DISADVANTAGE OF THE PETITIONER.

"Depreciation" was defined in the case of *San Francisco & P. S. S. Co.* vs. *Scott, Collector of Internal Revenue,* 253 Fed. 854, at page 855, as follows:

> "'Depreciation' as used in the statute is not to be confused with ordinary repairs. It is intended to cover the estimated lessening in value of the original property, if any, due to wear and tear, decay, or gradual decline from natural causes, inadequacy, obsolescence, etc., which at some time in the future will require the abandonment or replacement of the property, in spite of ordinary current repairs."

The question arose there by reason of deduction in fixing a valuation for tax purposes; but the same definition is applicable to any property valuation involving comparison of old with new construction.

The Circuit Court of Appeals in accepting the testimony of the one witness to which reference has been made previously, and applying a depreciation of two and a half (2½) per cent. per year, stated:

> "* * * There is no fixed rule as to the amount of depreciation to be deducted, but two and a half

per cent is reasonable in application for a period when there was such demand for vessels. Obviously, it might be unreasonable in other periods. The rule has varied between three and five per cent for depreciation in tax matters. The Treasury Department bulletin of January-June, 1920, fixed two per cent as the rate of depreciation on steamships. Two and a half per cent is said by the experts to be used here because of the unusual high standard of upkeep of the *Proteus.*" Rec*ord*, p. 230.

It is obvious that the higher the reproduction cost and the lower the percentage depreciation, which should be accepted by the Circuit Court of Appeals, as fixing the two factors used by it in calculating its somewhat arbitrary formula, the higher would be the result obtained. Just as the first factor discussed in the preceding text is the highest possible figure, so the second factor (depreciation) has been taken as the lowest possible amount; and, as we contend, the second factor, "percentage of depreciation", is equally unjustifiable under the circumstances.

The *Proteus* was constructed and delivered to her owner in June, 1900. *Record*, pp. 46, 121. The vessel, therefore, had been in operation up to the time of her loss (August, 1918) a period of eighteen (18) years. The authorities are in agreement that a reduction must be made depending on the age of the vessel under the reproduction theory. There is some diversity of opinion as to the amount or percentage of depreciation per year to be applied.

The Circuit Court of Appeals in this case apparently justified its application of a low depreciation by reference to "Treasury Department Bulletin of January-June, 1920", which, so the Court stated: "fixed two per cent as the rate of depreciation on steamships." *Record*, p. 230.

The Court presumably refers to a report in the Treasury Department Bulletin No. 2, January-June, 1920, Income Tax Revenues, page 139, where it appears that the Committee on Appeals and Review Recommendation (A. R. R.) increased the rate from 2 to 3, as an allowance for yearly depreciation on certain steamships of the Great Lakes.

It is to be noted that the Committee of Appeals and Review remarked that "the decision in question was based on an informal memorandum sent to the Unit, upon a specific case."

Furthermore, the Circuit Court of Appeals did not notice or take into consideration the fact that in the particular case to which it referred the rate was increased to three (3) per cent, the Committee stating:

> "The Committee accordingly recommends the establishment of a rate of three (3) per cent upon the vessels engaged in the bulk freight traffic" (certain vessels of the Great Lakes trade).

It seems clear that the Circuit Court of Appeals accepted the report of a two (2) per cent rate, as quoted from the Treasury Department Bulletin, without knowledge that it had been shown to have been too low, and that it had accordingly been increased to three per cent

by the Appeals Committee, as is recorded in the Treasury Bulletin cited.

Other decisions for taxation purposes indicate more liberal allowances for "depreciation".

In Treasury Bulletin No. 2, July-December, 1921, pages 148-150, the Solicitor's opinion quotes from the "present law" (Revenue Act of 1918) as follows:

> "Section 214 (a). That in computing net income there shall be allowed as deduction: • • •
>
> "(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

Cumulative Bulletin No. 3, July-December, 1920, issued by the Treasury Department (Bureau of Internal Revenue) on Income Tax Rules, at page 168, cites a decision of the Committee on Appeals and Review Recommendation of 1920, case No. 279, as follows:

> "The subject of depreciation of steam schooners engaged in the coastwise lumber trade has received the careful consideration of the Unit and at a conference between the president of the Ship Owners' Association of the Pacific Coast, professional accountants representing that association and officials of the Income Tax Unit, it was agreed after full discussion that the proper annual rate of depreciation on vessels of this class engaged in this trade is 5 per cent, based upon an expected life of 20 years."

Cumulative Bulletin III-I of January-June, 1924. Decision of Committee on Appeals and Review Recommendation, No. 4822, on Section 214 (a) 8 of Internal Revenue Act of 1918, on the subject of depreciation of certain freight and passenger steamships for tax purposes. The decision is to the effect that: "The Committee finds that the rate of five per cent depreciation claimed by the company on certain ocean freight and passenger steamships for the years 1918 and 1919 is not excessive and should be allowed." P. 159.

The case was submitted to the Committee as an appeal from the action of the "Income Tax Unit" which had reduced the claim of five per cent per annum depreciation on six steamships to an allowance of four per cent per annum on the cost, this being made up of three per cent for ordinary depreciation and one per cent additional allowed during the period of war service.

It appears that the vessels in question are high speed combination freight and passenger steamships. The Income Tax Unit had concluded that "it is not exceptional to find steamships making regular runs even though they have been in service for more than 33⅓ years," and in view of that fact the Unit concluded that a three per cent allowance for ordinary depreciation would be ample. The Committee on Appeals, however, increased the rate to five per cent depreciation (on first cost), and stated, at page 161:

> "It is probable that no rate of depreciation can be laid down which would apply to all companies operating ocean-going steamships. The

following authorities fix a minimum 4 per cent rate of depreciation for vessels: Accountant, January 1, 1916; Economist, May 16, 1914; Auditing, Theory and Practice, Montgomery (1916); Income Tax Procedure, Montgomery (1919 and 1920). By the Peninsular & Occidental Steamships Lines and the Royal Mail Steamship Packet Co. and by Accounting and Commissions, in the November issue of 1915, and by the Accountant in its issue of May 28, 1898, a 5 per cent rate is considered to be proper; by the Accountant of December 21, 1889, a rate of from 6 per cent to 7 per cent appears to be estimated as soundly based; and by the Philippine Islands Board of Public Utility Commissioners a proper rate of depreciation on steamships has been found to be 6½ per cent. (In re Manila Railroad Co., P. U. R. 1915, ch. 711, p. 722)."

The Treasury Department has also held that an annual rate of depreciation of five per cent is reasonable under ordinary circumstances on steam schooners engaged in coastwise lumber trade. *A. R. R. 279, T. B. 42-20-1245,* where it was stated:

"The subject of depreciation on steam schooners engaged in coastwise lumber trade has received the careful consideration of the Unit • • • it was agreed after full discussion that the proper annual rate of depreciation on vessels of this class engaged in this trade is five per cent, based on an expected life of twenty years."

In *Holmes Federal Taxes*, 1923 Edition, page 835, the author states:

> "In the case of some ships constructed during the war there seems to be a tendency to allow even a greater rate of depreciation, on the theory that the useful life will be less than twenty years."
>
> • • • • • • •
>
> "In a case involving the depreciation of a steamer, it has been conceded that 5% of the book value thereof was reasonable. In the case of some ships constructed during the war there seems to be a tendency to allow even a greater rate of depreciation on the theory that the useful life will be less than twenty years. The rate of 3% has been ruled to be reasonable for bulk freight steamships on the Great Lakes; • • •. The department has ruled that the proper annual rate of depreciation on steam schooners engaged in the coastwise lumber trade is 5%." Page 835.

The author further states at page 841, par. 16, in reference to Revenue Act of 1918, Par. 214 (a) 8 and 234 (a) 7, respecting "obsolescence":

> "Obsolescence is that loss which occurs in respect of tangible property from the changes due to the normal progress of the art in which such property may be used, or to becoming inadequate to the growing needs of the business. • • • It has its origin in the fact that although the original efficiency be maintained, yet, owing to improvements in the art or changed economic conditions, a device or factor in production will eventually have to be discarded."

In the case of Nicholas A. Galanos, dealing with income taxes for the years 1918 and 1919, Income Tax Unit allowed depreciation of the high rate of twenty-five per cent per annum on the Steamship *Antonios* and the Steamship *Elrini* (I. T.—P. A. 2—L. H. D.—205 App.).

The Treasury Department in Article 162 of Regulations 33 states:

> "No definite rate has been fixed by which an allowable deduction on account of depreciation in the value of any class of property subject to wear and tear is to be computed, but it is contemplated that this allowance should be upon the basis of the cost of the property and the probable number of years constituting its life."

A rate of five per cent (5) of the book value (for each year) as depreciation, was held to be a reasonable allowance for deduction from value, in the case of *San Francisco & Portland SS. Co.* vs. *Scott, Collector of Internal Revenue,* 253 Fed. 854.

Also, in the case of *United States* vs. *Standard Oil Company,* 258 Fed. 696, the same percentage of depreciation was approved by the Court, namely, five (5) per cent per annum.

A depreciation of five per cent (5) per annum was approved and adopted by Judge Hale in the District Court of Maine, in arriving at the value of an oil tankship, although he did not favor the reproduction and

depreciation method on which the valuation was based in the absence of evidence of market values, or any other evidence of value. *The Anahuac,* 295 Fed. 346, p. 348.

A deduction of as much as six (6) per cent per annum may not be unreasonable. *The Harmonides,* 1903 Prob. Div. I.

Under the foregoing authorities, it will be seen that a depreciation of as low as two and a half (2½) per cent which the Circuit Court of Appeals applied to the *Proteus* in the present case, is far below that ordinarily accepted and used in practice. Indeed, it is lower than is warranted by the testimony in the record on this point, which follows:

Mr. Martin admitted that in ordinary times, it is the practice to deduct five per cent for depreciation; but, for reasons which do not seem to be clear in the testimony, he stated that "during the last four years we have never taken off more than two and a half per cent during the war. I do not mean the last four years, I mean during the war, when vessel property was very valuable, the appreciation more than made up for the depreciation."

The Commissioner commented on Mr. Martin's views as to making a further reduction for depreciation because of war conditions, as follows:

> "• • • In normal times he would have deducted 5% for depreciation, but because of the War, thought half that amount sufficient. In this connection it is to be noted that depreciation is

> supposed to represent ordinary wear and tear and that the replacement value was fixed at War prices. It would seem, therefore, that full effect was given to the War in fixing the value to be depreciated and that the normal depreciation (assuming it to be something that can be determined by a general rule) should not be changed. The *Proteus* was maintained in first class condition but the actual wear and tear during War conditions was certainly not less than during normal conditions, although there is evidence that the ship was not operated 'more strenuously after the Railroad Administration took charge'." *Record*, p. 185.

It is obvious that if an appreciation is allowed, the *rate* of depreciation should not be altered. Mr. Martin, after taking what we maintain is an excessive figure for "estimated cost", "deducted two and a half per cent for eighteen years' depreciation, which is $525,000".

Mr. Martin made a serious error in this calculation.*

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* We have carefully calculated from Mr. Martin's figures what would be the result by applying to $1,750,000 his depreciation of two and a half (2½) per cent for each year, both on the first amount, and the yearly depreciated amount. The results of our careful calculation are as follows:

If we should take $1,750,000 as the principal, and reduce it directly by two and a half (2½) per cent for eighteen (18) years, which would be taking off forty-five (45) per cent, the amount to be deducted as representing that depreciation would be $787,500, as against the $525,000 which Mr. Martin actually used. In other words, by that method, his result is $262,500 too great.

Again, if instead of applying the total depreciation direct to the base figure ($1,750,000) we apply year by year, and reduce each product by two and a half (2½) per cent, the total depreciation to be deducted amounts to $640,406.65. Under that method, Mr. Martin's result is too great by $115,406.65.

The Circuit Court of Appeals carried over the same arithmetical error by adopting *in toto* Mr. Martin's conclusions.

If he applied the principle, which he said was the practice, he should have deducted five per cent for all but the last year. His high valuation is explained by his misapplication of the depreciation rate. That also may be said of the other "estimators" for the Respondents.

Mr. Alfred G. Smith said that he "would use the same figure I have used for years, and that is three per cent; roughly speaking, three per cent." Five per cent has been the normal depreciation. Although Mr. Smith stated that he figured "about three per cent" for a depreciative valuation, his deduction of $650,000 on a $2,000,000 first cost, is not in accordance with the rate of depreciation which he alleged that he used. *Record,* pp. 41, 42.

H figures actually indicate a deduction of *thirty-two and a half per cent* for the eighteen years, whereas his testimony indicates that he should have deducted *fifty-four per cent!* His error is as great as Mr. Martin's.

Mr. Raymond maintained that there was not any fixed rule of depreciation, but, he testified that from what he could find out as to what "the average was with all the lines in the United States and those of Great Britain, it would be from three and a half to four and a half per cent." Very few of them are in excess of four and a half per cent. The Ocean Steamship Company used five per-cent. In arriving at his estimated value, however, Mr. Raymond states that he "used five per cent and then gave them credit for being fifty per cent better than the other

fellow", so that "it substantially amounted to two and a half per cent." That, in addition to the excessive initial production cost, largely explains Mr. Raymond's high valuation. Mr. Raymond's view was that five per cent should be used in writing off depreciation, in a table he referred to before the Senate Committee of Commerce in valuations of vessel properties. His final conclusion seems to be that "everybody has got up to five per cent or more, five to ten." *Record,* pp. 63, 66.

Mr. Morrell testified as to the Petitioner's practice of depreciating five per cent on the original first cost for the first sixteen years, and after that, deducting two and a half per cent for four years. *Record,* p. 71.

Mr. Swasey and Captain Gillmor adopted what seems to have been a carefully prepared depreciation table known as the Stevenson-Taylor method, which is used by the American Bureau of Shipping, and which resulted in fixing the valuation of a vessel eighteen years old at .452 of its first cost. *Record,* pp. 87, 102, 110, 115.

Mr. H. B. Walker favored "three per cent on the original cost", which would give the vessel a life of thirty-three and one-third years. He said that some other lines use five per cent on a depreciation cost, that is, taking the original cost and reducing each year, and *other lines used* a higher rate of depreciation during the war. *Record,* p. 175.

The method of depreciation used by the Advisory Board to the War Risk Bureau appears on the scale valuation marked as an exhibit. *Record,* pp. 160-161. Appendix No. 3.

It appears from the statement of the Southern Pacific Company that the rate of depreciation used by that company as applied to the *Proteus* was three and three-fourths per cent per annum, which would result in placing the valuation of the vessel at thirty-two and a half per cent of her first cost, at the end of eighteen years. *Record,* p. 144.

The comparison of the foregoing estimates shows that the Stevenson-Taylor method is perhaps the most conservative of any, permitting as it does, a life of forty years. *Record,* p. 96.

We have dwelled at length on the factor of "percentage of depreciation" because it seems plain that the Circuit Court of Appeals for the Second Circuit did not give this subject due consideration in its application to the valuation of the *Proteus.* There was some testimony to the effect that the *Proteus* had been well-maintained; but, such testimony was in the nature of "hearsay", as those who testified had not recently been on board that vessel. It is also to be remembered that she had been in war service for a considerable time, and there is not any evidence whatever that the *Proteus* had undergone reconditioning or repairing during that period at least. Moreover, the Stevenson-Taylor table for depreciation was based on the long life of at least forty years, which the testimony indicates is a maximum.

It is submitted that the Circuit Court of Appeals erred in its assumptions of the two controlling factors, therefore, in that it placed a very much higher reconstruction cost than was justifiable under the circum-

stances (apart from the speculative nature of the testimony on which that value was founded), and also in that it applied a rate of depreciation very much less than has been used in any other recorded case, or in practice.

A correction of these two major errors would reduce the result even below the amount awarded by the Commissioner and the District Court, namely, $750,000.

V. THE APPLICATION OF THE REPRODUCTION AND DEPRECIATION METHOD SO EXCLUSIVELY AS WAS DONE BY THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN THIS CASE, IS NOT SUPPORTED BY THE WEIGHT OF THE AUTHORITIES.

The cases show a wide latitude in considering all elements which may bear on the question of the measure of the loss under the circumstances here: *The Colorado,* Brown Adm. 411, Fed. Cas. No. 3029; affirmed by this Court, *The Colorado,* 91 U. S. 692; *Leonard* v. *Whitwill,* 19 Fed. 549; *City of Alexandria,* 40 Fed. 697; *The H. F. Dimock,* 77 Fed. 226; *The Mobile,* 147 Fed. 882; *The Lucille,* 169 Fed. 719; *Alaska S.S. Co.* v. *Inland Nav. Co.,* 211 Fed. 840; *The Iron Master,* 1 Swabey (1859) Admiralty Reports, 441; *The Clyde,* 1 Swabey Admiralty Reports, 23 (1856); *Shipping Controller* v. *Lloyd Royal Belge Ltd.,* 1 L. R. 231, 389; K. B. D. Com. Court Nov. 10, 1919; *Harries* v. *Shipping Controller* (May 14, 1918), 14 Asp. Mar. Cas. 320; *Harmonides* (1903) Prob. Div. 1; *The Winkfield* (1902) P. B. 42; 9 Asp. 259 (July 23, 1903); *Roscoe on Damages in Marine*

Collisions, 2nd Edition, 1920, page 166; *Marsden's Collision at Sea,* 7th Edition, page 119.

Our contention on behalf of the Petitioner throughout has been, and is, that no one method of valuation may be followed exclusively, but that all the circumstances bearing on the value of the *Proteus* to the Respondents (particularly in its aspect as a *loss*) must be considered as relevant in arriving at an amount which would fulfill the requirements of the doctrine of *"restitutio in integrum"*. Dr. Lushington's statement in the case of *The Iron Master,* Swab. 443, is pertinent here:

> "In addition to testimony of this description (opinion of persons familiar with the vessel), many other circumstances may be called in aid, *as the original price of the vessel,* the amount of repairs done her, *the sum at which she was insured,* and other circumstances of a similar nature." (Italics ours).

That case was quoted with approval in the case of *The Colorado* decided in the lower court by Judge Longyear, Brown Adm. 411, Fed. Cas. No. 3029, and affirmed by this Court in 91 U. S. 692; also in the English case of *The Harmonides* (1903) Prob. Div. 1. See also *The Minnesota Rate Cases,* 230 U. S. 433, in which this Court announced *"all relevant facts"* must be taken in consideration in arriving at property values.

In reaching his conclusions, the Commissioner stated:

> "I do not feel called upon to find an exact replacement value or a particular method of depreciation" * * * or, "to adopt any particular

> theory under which, by means of mathematical calculations, a final figure would be produced * * *."
>
> * * * "I can do no more than find that sum which, after a consideration of the whole case in the light of all of its facts and circumstances, would seem to be sufficient to compensate the claimant for its loss * * *."

Citing *The Utopia* (Judge Brown) 16 Fed. 507, p. 510; *Record,* p. 190.

Judge Mack also stated in his opinion on the exceptions to the Commissioner's Report:

> * * *"If evidence is adduced, indicating that the market price is not fair under the circumstances, then all other relevant facts should likewise be considered in determining fair value, unless indeed some positive form for ascertaining value is established by legislation. Cf. the rate regulation cases; *Minnesota Rate Cases,* 230 U. S. 352, 434."
>
> *"All the relevant facts should be considered."* (Italics ours.) *Record,* p. 193; 285 Fed. 617, pp. 619-620.

This seems to be the only fair way to approach the question, that is, by considering it from all angles, in view of the circumstances.

Indeed, the "reproduction and depreciation" method applied by the Circuit Court of Appeals for the Second Circuit, to the obvious exclusion of other relevant testimony bearing on the measure of the loss of the *Proteus,* is contrary to analogous cases decided in other circuits, as is indicated by the following cases: *The H. F. Dimock*

(C. C. A. 1st Cir., 1896) 77 Fed. Rep. 226; *La Normandie* (C. C. A. 2nd Cir., 1893) 58 Fed. Rep. 427; *Whitehurst* v. *United States* (C. C. A. 4th Cir., 1921), 272 Fed. Rep. 46; *The J. E. Trudeau* (C. C. A. 5th Cir., 1893) 54 Fed. Rep. 907; *The Samson* (C. C. A. 9th Cir., 1914) 217 Fed. Rep. 344; 208 Fed. Rep. 347; *The I. C. White* (C. C. A. 4th Cir., 1924) 295 Fed. 593.

The Circuit Court of Appeals for the First Circuit, in the case of *The H. F. Dimock, supra,* discredited the exclusive application of the rule of cost of reproduction, p. 234, and laid down the rule that all relevant facts should be considered, p. 236.

The Circuit Court of Appeals for the Second Circuit, in the case of *La Normandie, supra,* although holding that "there is no hard and fast rule", proceeded on the foregoing principles as applied in the First Circuit; whereas in the instant case, *The Proteus,* the same court adopted the narrower ruling of reproduction cost.

The Circuit Court of Appeals for the Fourth Circuit, in *Whitehurst* v. *United States, supra,* used the original cost of the commodity as the basis of the measure of damage.

The Circuit Court of Appeals for the Fifth Circuit, in the case of *The J. E. Trudeau, supra,* while apparently favoring the production theory, with a fixed proportion of one-third off new for old, accepted the ruling of the District Court based on original cost, with an annual depreciation for age. P. 912.

The Circuit Court of Appeals for the Ninth Circuit, in the case of *The Samson, supra,* applied the rule of original cost less depreciation for age; and although there was evidence that reproduction cost had increased materially between the time of construction and the loss of the vessel, 208 Fed. 347, p. 352, the reproduction rule later adopted in the instant case in the Second Circuit was disregarded in the Ninth Circuit.

The Circuit Court of Appeals of the Fourth Circuit declined to accept the reproduction and depreciation method as the sole test of value of a vessel totally lost in collision, and reversed the Commissioner and the District Court which had adopted that method. *The I. C. White,* 295 Fed. 593. The Court stated, at page 597:

> "* * * The cost of replacement is a factor to be used in checking up the other testimony; but *it should not have been given the principal weight, much less should it have been treated as controlling.*"
>
> "*In reaching our own conclusion, we have sought to keep all the evidence in mind.* * * *"
>
> (Italics ours.)

The District Court, in that case, in affirming the Commissioner's findings, had taken an estimated reproduction cost at the time of loss, and depreciated that amount by ten per centum (10%), for the period of a year and eight months of the age of the vessel, arriving at a value of about $98,500.

The Circuit Court of Appeals reduced that valuation to $66,000, by considering evidence of sales of other vessels, *and other relevant facts bearing on values.*

The so-called "rate making" cases are somewhat analogous, in so far as a "fair value" is sought as the basis of fixing a reasonable rate for public utilities.

In the earlier case of *Smyth* v. *Ames* (1898) 169 U. S. 466, it was held by this Court: "* * * the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the *fair value* of the property being used by it for the convenience of the public." P. 546. In approaching a determination of what would be a "fair value" for the property in question, the Court enumerated several factors to be taken into account "in order to ascertain that value". Among these several factors was the "cost of construction". It was suggested that there might be other factors but that these were merely different kinds of evidence to be given such weight as they might deserve. In other words, the Court in that case had applied the same reasoning as was later applied in the *Minnesota Rate Cases, supra,* to the effect that all relevant facts must be considered in the ascertainment of the fair value of property.

In the case of *Galveston Electric Co.* vs. *City of Galveston,* the matter involved was the fare to be paid to insure a reasonable return on the investment, and the basic value of the property was considered. The Master to whom the matter was referred found that the low fare in dispute was confiscatory; but the District Judge dismissed the bill seeking an injunction against enforcement of the fare and "found a much smaller base value" than the Master had advised. This Court, in reviewing the decision of the District Judge which it affirmed,

April, 1922, 258 U. S. 388, while it discussed the reproduction and depreciation method, indicated by its decision disapproval of the application of transitory values as a basis in determining the real value of the property.

Also, in *The Minnesota Rate Cases,* 230 U. S. 352, in ascertaining property values for arriving at just compensation, this Court stated at page 434: "The ascertainment of that value is not controlled by artificial rules. *It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts.* * * * " (Italics ours.)

In the case of *Georgia Railway & Power Co.* vs. *Railroad Commission of Georgia* (June 1923) 262 U. S. 625, this Court noticed that the Commission had "refused to adopt reproduction cost as the measure of value", as to which the Court remarked:

> "The refusal of the Commission and the lower court to hold that, for rate making purposes, the physical properties of a utility must be valued at the replacement cost less depreciation, was clearly correct. * * *"

And that it was sufficient that the Commission had given careful consideration to replacement and had made an allowance to represent appreciation in value.

The cost of reproduction may be "of service in ascertaining the present value of a plant, but it is not conclusive", as was said in the *Minnesota Rate Cases, supra,* 230 U. S. 352; and the same reasoning is as properly applicable to ascertainment of the value of the *Proteus*

in the present case, as it is to determination of the present value of property for rate making purposes.

The same broad rule for ascertainment of value for which we contend in the present case, is also applied in condemnation proceedings.

This Court reviewed a decision of the Circuit Court of Appeals for the Fifth Circuit, on questions of value arising from condemnation proceedings, in the case of *Albert Hanson Lumber Co., Ltd.* vs. *United States* (April 1923) 261 U. S. 581.

The lower courts had awarded the sum of $65,000 as compensation to the owner, 227 Fed. 894. The owner then claimed error in the amount of the award. It seems that there was evidence of original cost, and of "present" cost, and of a resolution of the owner to enter into a contract of sale.

This Court stated at page 589:

> "The evidence tended to show that the original cost of the canal was $65,000, and that it would cost $152,000 to reproduce it. There was evidence disclosing the size of the canal, and its suitability for use, together with the condition of the property. It cannot be said that the verdict of $65,000 is without support. Erie R. R. Co. *vs.* Winter, 143 U. S. 60, 75."

The lower court had instructed the jury "to consider what it did cost and what it would cost now to build the canal, the reasons that induced the company to make the contract, and in reaching a verdict they were not bound by the $65,000 agreed upon and might find an amount

greater or less than that." The charge to that effect was held to be proper by this Court.

The inference from that decision is that "reproduction" cost was not a controlling factor, and apparently was not given as much weight as the original cost, in arriving at a fair value of the property.

In the case of *United States* v. *New River Collieries* (May, 1923) 262 U. S. 341, certain coal was requisitioned by the Government, and the question involved was as to the compensation to be paid the owner. The Lower Court had excluded evidence offered by the United States to show cost of production of the coal and a reasonable profit, it having been contended that a "market price" could not be properly fixed. This Court approved the exclusion of that evidence (cost of production plus reasonable profit) because it was held that such evidence did not prove the market price or a fair value.

This Court recently held in the case of *Brooks-Scanlon Corporation* v. *United States,* 265 U. S. 106, 123-124, which was reviewed by the Court from the Court of Claims, that the contract had been requisitioned as well as the material constituting the vessel. The contract to build had been entered into on March 28, 1916, for date of delivery on February 1, 1918. The vessel had been requisitioned during August, 1917, and a claimant had been awarded an amount in "just compensation" on January 23, 1920, which was substantially the contract price of the vessel after accounting for certain changes.

In discussing the measure of damage, this Court stated at Page 125:

> "This Court has held in many cases that replacement cost is to be considered in the ascertain-

> ment of value, but that it is not necessarily the sole measure of or guide to value. We are of opinion that value, so far as material, rather than replacement cost should be taken into account, for the ascertainment of just compensation. * * *"*

The Court then enumerated a number of factors which should be taken into account in determining the value of a vessel at the time of the taking; but, it is clear from the Court's statement quoted above, that it did not approve the test of replacement cost as the sole criterion of value.

In a condemnation proceeding in the United States Circuit Court of Appeals for the First Circuit, entitled *United States* v. *Boston C. C. & N. Y. Canal Co.*, 271 Fed. 877, the question before the Court was the amount to be paid the owner of a canal in condemnation proceedings brought by the United States. A jury returned a verdict fixing the amount, and the United States procured a writ of error in respect of admission of certain testimony, among other errors assigned.

The Appellate Court found that the Lower Court should have passed upon the preliminary question of fact or submitted it to a jury with instructions that "they should not consider the evidence of reconstruction cost upon the question of value, unless they were satisfied that a reasonably prudent man would purchase or under-

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* Incidentally, it is interesting to note that the Court of Claims found that at the time of the requisitioning (August 1917) the value of such ships was $200. per deadweight ton, and that the same value pertained on February 1, 1918. An application of that valuation to the deadweight tonnage of the *Proteus*, taken as 3850, would give her value as $770,000; but, that amount would be the valuation of a new vessel, whereas the *Proteus* was 18 years old.

take the construction of the property at such a figure".

It was stated by the Court, at Page 888:

> "It is in substance conceded that reproduction cost is competent evidence of market value, provided the prices existing at the time of reproduction are normal, making due allowance for the period of time necessary to reconstruct the property."
>
> • • • • • •
>
> "While it is customary to admit evidence of reproduction cost bearing upon the question of value, the rule seems to be subject to certain limitations. In the Minnesota Rate Cases, 230 U. S. 352, 452, • • • Mr. Justice Hughes, speaking on this subject, said:
>
> > "The cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it should not justify the acceptance of results which depend upon mere conjecture.'"

The foregoing cases certainly do not support a valuation by the reproduction and depreciation method exclusively, nor do they give any greater weight to that element in ascertainment of value than they give to all other facts adduced by the evidence and bearing on the measure of the loss to the owner. Many of the cases, in fact, go further and reject "reproduction" values, particularly, where, as in the present case, those reproduction values are founded on transitory and abnormal costs of production.

The case of *Mersey Docks and Harbor Board and the Lord Commissioners of the Admiralty*, (1920) 3 K. B. Div. 223, which is cited and quoted by the Circuit Court of Appeals, *Record*, page 229, is exceptional and distinguishable, because that case was one where the owner of the lost vessel actually replaced the vessel by new construction at the time. The cost of that replacement was, therefore, a definite monetary loss. Here, the owner did not make any effort whatever to replace the *Proteus*, either by purchase or by reconstruction.

It appears from the statement of facts accepted by the court, in *Mersey Dock and Admiralty Commissioners*, 3 K. B. 223, page 227, that the Harbor Board had been forced to replace the barge which had been requisitioned by The Admiralty, and that the Board had paid for the barge a specific amount which it recovered as a measure of its loss.

The following is quoted from the findings of fact of the special case, stated by an arbitrator, preceding Lord Reading's opinion, and which facts the court had taken into consideration at page 227:

> "* * * The condition of the Port of Liverpool at the date of the requisition and at all material times afterwards was such that it was the duty of the Board to replace the barge as soon as possible, and accordingly at the earliest possible date, namely, in February, 1919, the Board obtained estimates for that purpose. The lowest estimate was that of the original builders, who offered to duplicate No. 798 for 63,000 pounds with a provision for increase or decrease in the event of increase or decrease in the cost of materials or

labor during the construction. The Board, reasonably and properly accepted the builders' offer, and on May 7, 1919, a formal contract to replace the barge as per the original specification and plans upon the terms of the offer was entered into. Wages have risen during the construction under this contract, and for the purposes of this case, it may be taken that the amount which the Board will have to pay the builders will not be less than £70,000. I further find that the barge cannot be completed before the spring of 1920."

The Board claimed the difference between £22,750, the contract price of No. 798, and the price they will have to pay for the barge now being built to replace her.

> "In these circumstances the Board claimed from the Admiralty the difference between £22,750, the contract price of No. 798 and the price they will have to pay for the barge now being built to replace her, and they further claimed £28,770 for the loss of service of the barge for the three years which will have elapsed between the date when the barge No. 798 would have been completed and available if she had not been taken by the Admiralty and the date when she will be replaced by the barge now building." Pages 227-228.

The original contract for the barge was dated December 4, 1914, for delivery on or before October 1, 1915. Owing to certain delays, the barge did not approach completion until February 8, 1917, and the Admiralty requisitioned the barge in her then state, and later, on August 7, 1917, notice was given that the Admiralty purposed purchasing the barge from the builders.

The amount of compensation was left to an arbitrator whose decision was made in the form of a "special case".

After reciting the findings of fact, the opinion of the court was requested on the amount of compensation.

The court decided that the Board was entitled to the amount of money required to replace, that is, the difference between the contract price and the cost of replacing her; but, that the Board was not further entitled to compensation for loss of use during the period of three years between the date when the original barge would have been completed and turned over to the Board, and the date when the barge which the Board built to replace the original barge, was delivered to the Board.

That case has been discussed at length, to show that it is distinguishable from the present case and cannot be taken as an authority to establish "reproduction cost" as the sole factor in arriving at a measure of the loss, as it seems to have been accepted by the Circuit Court of Appeals.

VI. Abnormal and transitory values should not control, even where market value is the test. There is all the more reason why they should not apply under the circumstances here.

Bearing in mind that this loss occurred during August, 1918, and that the Railroad Administration did not surrender control of railroad properties, including floating equipment, until March 1, 1920, and in view of the fact that the *Proteus* was not replaced, there does not seem to be any good reason why the respondents should now

maintain that a highly transitory valuation of August, 1918, should be exclusively applied in their favor.

The District Judge pointed out that:

> "• • • While the market price may be the fairest test of the value of standard commodities commonly bought and sold, when the normal conditions of free competition have full play, this test obviously fails not only if there is no market but when the conditions which make the test a proper one do not obtain. • • •"
>
> • • • • • •
>
> "While, as above stated, under normal conditions the market price of standard commodities might be taken as the exclusive test of value, it is fair value under the circumstances, rather than market price, which is the ultimate criterion. • • •" *Record*, p. 193.

It is immaterial whether the test is the "reproduction" cost or whether it is "market value"; the courts are in accord that fair value is not that derived from a transitory market, or a market which is not free, but the value must at least approximate the normal.

Mr. Justice Holmes in *City of New York* vs. *Sage*, 239 U. S. 57, 61, stated:

> "• • • But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser *in fair market conditions* would have given for it in fact— • • •" (Italics ours.)

To the same effect are the other rate making cases cited previously; also, the case of *Reno Co.* vs. *Public*

Service Commission, 298 Fed. 790, 793; 300 Fed. 645, 654, where the Court discussed reproduction cost in ascertainment of "fair value", but held that it was not *the* controlling factor, stating in 300 Fed. at page 654:

> "It is significant that, in practically every statement of this rule, value is qualified by the adjectives fair or reasonable. Neither original cost, reproduction cost, reproduction cost less depreciation, market value of the stock and bonds, or any other single circumstance is necessarily controlling or equivalent to reasonable value."
>
> "* * * In times when prices and the value of money and property are stable, it is frequently the best and most reliable index of reasonable present value; but in times of abnormally high or unusually low prices, a condition which in its nature must be temporary, the then reproduction cost would be unjust. * * *"

That statement applies as forcibly to the valuation of a vessel lost under the circumstances here, as it does to ascertainment of fair value for any other purposes.

The New York rule in regard to fair market value, is based on the presupposition of a *voluntary* purchase in an open market, *In re Inwood Hill Park,* 189 N. Y. S., 642, where the Court stated as follows, at page 645:

> "* * * What the owner is entitled to is the value of the property taken, and that is what it is fairly believed a purchaser in fair market conditions would have given for it in fact—what a purchaser who is not compelled to buy would pay under ordinary circumstances to a seller who is

not compelled to sell. People *ex rel.* Brown *v.* Purdy, 186 App. Div. 54, 57, 173 N. Y. Supp. 782, affirmed 226 N. Y. 635, 123 N. E. 883. * * *"

The Massachusetts rule is similar, as announced in *Lawrence* vs. *Boston,* 119 Mass. 126, 128, where the following instructions to the jury were approved:

"* * * 'Market value' means the fair value of the property, as between one who wants to purchase and one who wants to sell any article, *not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; nor its speculative value; not a value obtained from the necessities of another.*" (Italics ours.)

So also is the ruling laid down in the Illinois decisions of *Brown* v. *Calumet River Railway Co.,* 125 Ill. 600, 606, and *Lanquist* v. *City of Chicago,* 200 Ill. 69, 73. In the former case, the approved instruction to the jury was:

"Not to consider the price which the property would sell for *under special or extraordinary circumstances,* but its fair cash market value if sold in the market under ordinary circumstances * * *";

and in the latter, the Court stated:

"The rule, that permits proof of other sales in order to show value, requires that such sales *should be made in a free and open market, and where a fair opportunity for competition exists.*"

The tendency to reject abnormal war prices, and to seek a normal cost of materials and production by aver-

aging prices for a period of normal years is indicated in Public Utility Reports Anno. 1918 C. page 248, where under the headnote "Annotation of Valuation" appears the following statement:

> "Ascertainment of reproduction cost.—the reproduction value of a utility plant based upon prevailing abnormal high prices of labor and materials should not be regarded in arriving at the value of the plant for rate making. Re Light, Fuel & P. Co. (W. Va.) Case Nos. 554, 555, Dec. 1, 1917."

The averaging of prices is also prescribed in the *Railway Control Act of March 21, 1918,* Pub. No. 167, 65th Congress, which provides payment for carriers taken over, (as) "just compensation an annual sum * * * not exceeding a sum equivalent as nearly as may be to its annual average operating railway income for the three years ending June 30, 1917."

Also, the United States Shipping Act of September 7, 1916, 39 Stat. 728, Sec. 10, suggests valuation under *normal* conditions:

> "Thereafter, upon ascertainment by agreement or otherwise, the United States shall pay the person interested *the fair actual value based upon normal conditions* at the time of the taking of the interest of such person." (Italics ours.)

Although the object of fixing the then value of the properties involved in the foregoing citations may be to ascertain a fair compensation as a return on the property, or loss of use of the property, or loss of the prop-

erty; the same general principles should be applied to the present case, whether the valuation of the *Proteus* is reached by a "reproduction theory", or by a consideration of all factors as we contend; and they only emphasize the fallacy and unfairness of a theory based on a reproduction figure representing a highly transitory and inflated value as of a particular date (August 1918).

VII. THE FACT THAT THE *Proteus* WAS A REQUISITIONED VESSEL, AND THAT HER OWNER WAS DEPRIVED NOT ONLY OF THE POWER TO DISPOSE OF HER BY SALE, BUT OF THE RIGHT TO HER USE, AT LEAST UNTIL AFTER MARCH 1, 1920, WAS AN IMPORTANT FACTOR IN MEASURING THE DAMAGE SUSTAINED AT THE TIME OF HER LOSS, AND ONE WHICH THE CIRCUIT COURT OF APPEALS PLAINLY DISREGARDED.

The Circuit Court of Appeals in its opinion commented on the fact that the *Proteus* was under requisition at the time of her loss, but it stated:

> "* * * * The act of requisition was at an end and the loss that of the owner" (referring to the sinking of the *Proteus* on the particular date). "At that time, if the owner was free to sell her, there was a ready market. * * *" *Record*, p. 229.

The Court's meaning is not quite clear when it states that the act of requisition was at an end by reason of the sinking and loss of the *Proteus*. The statement is literally true, of course, but it is also true that the *Proteus* no longer existed as a useable vessel, as she became from that moment a total loss. It is difficult to comprehend

how the value of the *Proteus* could have been increased by reason of the fact that she became a total loss, for the requisition certainly did not terminate until she was a total loss, and did not have any further value as a vessel.

The courts have recognized that vessels requisitioned because of war conditions suffered thereby a decrease in value to their owners. *The Kia Ora,* 246 Fed. 143; *Harries* vs. *Shipping Controller,* 14 Asp. Mar. C. 320; *Shipping Controller* vs. *Lloyds Royal Belge,* 1 L. L. R. 231, 389 (1919).

In *The Kia Ora,* Judge Waddill drew a distinction between the value of a vessel while operating freely (unrestrained by requisition), and her value while under requisition for war purposes, stating, at page 144:

> "* * * Her value at the time of stranding, under requisition for war purposes, was $1,772,620; if not under requisition, at existing rates, her value would be about $3,000,000. * * *"

These values refer to a date as of February 24, 1917.

Similarly, in the case of *Harries* vs. *Shipping Controller,* the value free from requisition was stated at £44,500, while it was placed as low as £28,500 while under requisition.

The reason for loss in value to the owner because of the requisitioning is obvious; the owner no longer has domain over his property. As is stated in 23 A. & E. Enc. Law, 261: "In its proper use the term 'property' applies only to the rights of the owner in the thing possessed."

The Court indicated in *Braceville Coal Co.* vs. *People,* (1893) 147 Ill. 66, p. 71, that property in its broader sense is not the physical thing, but is the right of dominion possessed and power of disposition of it.

Also, Mr. Justice Holmes' statement in *International News Service* vs. *Associated Press,* 248 U. S. 215, page 246, is to the same effect, that property does not arise from value, although exchangeable, but it depends upon exclusion by law from interference.

Here, the Southern Pacific Company, not having the right of user, held title to a piece of property which cannot be said to have been as valuable as if it had been free.

The Commissioner properly took into consideration the fact that the *Proteus* was under requisition, and that this condition detracted from her value at the time of her loss. He stated:

> "In addition to this I think the claimant has erred in failing to give effect to the fact that at the time of the loss the ship was under requisition. It is, of course, entitled to be put, to the fullest extent possible, in the same position pecuniarily that it would have been in if the loss had not occurred, but what is that position? At the time of the loss the claimant was not only unable to sell the ship but was barred by law from using or disposing of her in any way. It had no control over her at all and had she not been lost would have received only what the Government would have paid for her use until such time as she would have been returned. * * *." *Record,* p. 184.

Also, the District Court held that:

> "* * * The *Proteus* was under requisition, and the ascertainment of her value must be predicated on that fact. * * *." *Record*, p. 193.

As has been pointed out, the Circuit Court of Appeals disregarded this factor entirely in arriving at its valuation of the *Proteus*.

VIII. THE ORIGINAL COST OF THE *Proteus*, WHICH WAS LESS THAN HALF OF THE AMOUNT AWARDED BY THE CIRCUIT COURT OF APPEALS AS MEASURING HER VALUE AT THE TIME OF THE LOSS, WAS ENTIRELY DISREGARDED AS A FACTOR IN ASCERTAINMENT OF THE MEASURE OF THE DAMAGE.

The cost of the building of the *Proteus* in 1900 (18 years before her loss) was $540,440, as has been stated previously. In 1909, she had been reboilered and repaired at a cost of $90,000; but, that was nine (9) years before her loss, and if her original boilers lasted only nine years in the first part of her life (until 1909), she must have been nearly due for reboilering at the time of her loss in 1918. The total amount of her owner's investment in the *Proteus* was, therefore, about $630,000. But this investment had been earning profits for eighteen (18) years, and those profits were presumably such as to cover not only a fair return on the capital invested, but to include an allowance for depreciation due to her

age of eighteen years, as the original investment would sooner or later become entirely absorbed at the end of the commercial life of the *Proteus*.

If this figure representing the total investment ($630,000) is compared with the figure which the Circuit Court of Appeals awarded ($1,225,000), it is seen that the owners would receive under the decision of the Circuit Court of Appeals the large sum of $575,000 in excess of what they paid for the *Proteus* originally, including betterments. That Court stated:

> "* * * The valuation fixed for the *Proteus* as of August 1, 1918, is at twice her original cost, whereas the valuation fixed by the witnesses called by the petitioner is about one-fifth to one-sixth more than her original cost. * * *." *Record*, p. 230.

That comparison, instead of supporting the high valuation, and excusing it, emphasizes the reasonableness of the petitioner's contention. Under the latter, appreciation is allowed in full. Under the former, the allowance for appreciation seems obviously excessive.

If the rule adopted by the Circuit Court of Appeals of the Ninth Circuit in the case of *The Samson*, 208 Fed. 347, and (1914) 217 Fed. 344, of original cost less depreciation for age should be applied to the present case, the value of the *Proteus* would have been found to be less than half the amount fixed by the Circuit Court of Appeals of the Second Circuit here. See also *Hanson Co.* vs. *United States* (1923) 261 U. S. 581, referred to previously.

IX. THE "BOOK VALUE" PLACED ON THE *Proteus* BY HER OWNER, THE SOUTHERN PACIFIC COMPANY, SUPPORTS OUR CONTENTION THAT THE MEASURE OF LOSS NOW SOUGHT IS ENTIRELY EXCESSIVE. THIS FACTOR WAS NOT MENTIONED AND PROBABLY NOT CONSIDERED BY THE CIRCUIT COURT OF APPEALS.

The Southern Pacific Company was carrying the steamship *Proteus* on its books at a value of $224,986.49 as of August 19, 1918, the date of her loss. *Record*, p. 189.

It seems that the practice of that company was to depreciate the values of vessels by seventy-five (75) per cent of cost during the first twenty (20) years of use. Assuming that the company while depreciating the value for age had not adequately appreciated the value for the increase in cost of material and labor between 1900 and 1918, nevertheless, if the factor three should be used as representing that increase (none of the witnesses set a higher factor of increase than three), then the appreciated value would be about $675,000. That is a little more than half of the award made by the Circuit Court of Appeals.

It is somewhat inconsistent that with a considered "book value" in the amount stated, the owner should seek to recover nearly six-fold that value, as the measure of the damage.

X. THE *Proteus* WAS OF A SPECIAL TYPE OF CONSTRUCTION, WHICH WOULD HAVE OPERATED TO REDUCE HER SALE VALUE IN AN OPEN MARKET. THAT FACT WAS DISREGARDED BY THE CIRCUIT COURT OF APPEALS.

The *Proteus* was a combined freight and passenger coastal steamer, of 4,836 gross tons, and a deadweight capacity of 3800 tons, with 4,000 horse power, and a speed of about fifteen knots, according to the statement made by counsel. *Record*, p. 59.

One of the witnesses produced on behalf of the petitioner, Mr. Swasey, who was thoroughly familiar with the *Proteus*, having been employed at the works of the builder during the time that the *Proteus* was under construction, described in detail the special features of the *Proteus*, which militated against general use. *Record*, pp. 110 to 115.

Perhaps the most pertinent fact brought out by Mr. Swasey resulted from his comparison of the *Proteus* with an ordinary cargo carrying vessel of the same gross tonnage. Such a cargo carrier (4836 *gross* tons) would carry about 7,000 tons *deadweight;* whereas, the *Proteus* could carry only 3800 to 3830 tons deadweight. *Record*, pp. 59, 132. The respondent's witness, Mr. Palen, testified that the *Proteus* could carry only 2778 tons of cargo, the balance of the deadweight capacity being taken up by water, fuel and stores. *Record*, p. 132.

That comparison is particularly important because the demand for vessels during this period was for sea-

going cargo carriers, and not for coastal combined passenger and cargo carriers. This demand was reflected in the method then in use of gauging the value of a vessel by her "deadweight tonnage", that is, by her carrying capacity. Thus if $220 a deadweight ton, which was a figure used by one of the witnesses whose testimony has been cited previously, may be taken as a unit value, the ordinary cargo carrying, seagoing vessel, of the same *gross* tonnage of the *Proteus*, would have a value of $1,540,000, viz., 7000 x $220 (without considering the amount to be taken off for age); whereas, the *Proteus* with her 3800 tons of deadweight capacity would be worth only $736,000. The latter figure approximates the amount awarded by the Commissioner and confirmed by the District Court; but, it is $489,000 less than the amount awarded by the Circuit Court of Appeals, as the measure of the damage. If the lower *cargo* carrying capacity of 2778 tons should be the test of value, the *Proteus* would be worth only $611,160 (2778 x $220).

There were other features of special construction described by this witness, such as the formation of the deck and upper hull, whereby, as he said: "her strength, therefore, her freeboard, was very low, up to her solid deck." *Record*, p. 110.

Still other defects were her system of hatches, and the peculiar construction of her keel as compared with the ordinary cargo carrying vessel; also, the absence of double bottoms in the *Proteus*, which militated against her strength and usefulness. *Record*, p. 111.

The remarks of Circuit Judge Rose, in delivering the opinion in the case of *The I. C. White,* 295 Fed. 593, at page 595, are pertinent:

> "The market value yardstick cannot be applied to a ship of so peculiar construction that, while it profitably serves some need of its owner, nobody else has occasion for it. If it were offered for sale, it would very probably bring little more than its junk value."

It is suggested that this special construction and type of the *Proteus,* as explicitly described and illustrated by Mr. Swasey, must have a direct bearing on that vessel's value. This evidence, however, does not seem to have been given any weight at all by the Circuit Court of Appeals in arriving at its high valuation under the reproduction theory.

XI. Evidence bearing on insured value of the *Proteus* supports the fairness of the amount awarded by the Commissioner and confirmed by the District Court.

The evidence shows that vessels of the *Proteus* class, if not the *Proteus,* had been insured under hull and disbursement insurance first in the sum of $600,000 and then increased to $690,000 at about the time the Railroad Administration assumed control of that vessel. *Record,* pp. 163, 164. Two months after the loss of the *Proteus,* that figure ($690,000) had been taken as a valuation for

war risk insurance on the sister ship of the *Proteus*, named the *Comus*, and identical to the *Proteus*. *Record*, pp. 150, 153, 162 and 165.

The *Comus* was an exact duplicate of the *Proteus* in construction, age and service, and it may fairly be assumed that the two vessels were of equal value to their owner. *Record*, 121, 135, 136.

Although there was testimony that the officials of the Railroad Administration did not arrive at an agreement with the representatives of the Southern Pacific Company concerning this valuation for insurance purposes, yet that amount was placed in the war risk insurance from the existing policies of hull and disbursements, by conference among certain Railroad Administration officials, then serving as such, who had formerly been connected solely with the coastal lines. Among these officials was the Manager of the Southern Pacific Company's Atlantic fleet, of which the *Proteus* was a unit, and he must be presumed to know the valuation placed by the Southern Pacific Company on the *Proteus*. *Record*, pp. 45, 46. It is certainly not unlikely that there would be an under-valuation by these interested parties at this critical time, for insurance purposes.

It has been held that among the elements which may be considered in arriving at vessel values, "the sum at which she was insured" is relevant. *The Ironmaster*, 1 Swabey (1859), Adm. Reports 441, cited by Judge Longyear to that effect in the case of *The Colorado*, Brown Adm. 411, Fed. Cas. No. 3029, affirmed by this Court in 91 U. S. 692. The evidence adduced in the record bearing on insured value is corroborative of the lower valuation of the *Proteus* as found by the Commissioner and confirmed by the District Court.

XII. THE APPLICATION OF THE SCALE OF VALUATION FIXED FOR VESSEL PROPERTY BY THE ADVISORY BOARD OF THE WAR RISK INSURANCE BUREAU AT THE TIME OF HER LOSS, INDICATES THAT THE *Proteus* WAS WORTH LESS THAN $700,000, ACCORDING TO THE ADVISORY BOARD'S SCALE.

A significant development of the inquiry into the insurance placed by the War Risk Bureau is that the "Advisory Board" had formulated a scale to regulate the maximum amounts for covering various classes of vessels, graduated by age; and that by this scale, a maximum insurance that would have been allowed on the *Comus* (or the *Proteus*) would be $175 per deadweight ton, less ten per cent for unclassified vessels. *Record,* pp. 151, 152, 153, 154, 157, 160, 161. The *Comus* and the *Proteus* were not classified. *Record,* p. 46. Under the assumption of 4,000 tons as a deadweight capacity, the maximum presumably for insurance in the War Risk Bureau would be $630,000 on that scale ($175 x 4000 less 10%), *Record,* p. 161. Taking the deadweight capacity of the *Proteus* as about 3,850 tons, the use of that figure in the Advisory Board scale, *Record,* p. 161, would give a *maximum* to be allowed for insurance purposes the sum of $606,375. It appears that the insurance in the amount stated ($690,000) had been accepted under a special arrangement and before the valuation had been passed upon. *Record,* pp. 150, 153, 164.

Undoubtedly the members of the Advisory Board (the report was signed by two of the recognized experts on valuations of vessels for insurance purposes, namely Hendon Chubb and W. N. Davey), who had formulated the scale for valuation purposes on August 26, 1918 (one week after the loss of the *Proteus*), *Record,* p. 161, had based their figures on the then high valuations of vessels, particularly trans-atlantic cargo carriers and that although they had the interests of the Government in mind, they also so regulated the scale as to afford liberal protection to American shipowners. Appendix No. 3.

The members of this Committee are concededly men with wide knowledge of shipping and shipping values and their formulation of what would be a fair maximum value under insurance for total loss may be taken as a reliable estimate of vessel valuations at the time, albeit at the highest peak of the abnormal conditions prevailing at the time.

The valuation as it works out for *Comus* (and for her sister ship the *Proteus*), accords very nearly with the average of the valuations placed on the *Proteus* by the Petitioner's witnesses, and indicates that about $600,000 would be a fair valuation of the *Proteus* under the conditions of high valuation then prevailing. That result may be said to be the conclusion of the Advisory Board for valuation of a vessel of the size and type of the *Proteus;* as it is derived directly from that Board's table. *Record,* p. 161. Appendix No. 3.

XIII. THE VALUE OF THE PROTEUS AS A "GOING CONCERN" WOULD PROBABLY BE LESS THAN $500,000.

The Commissioner suggested that the cases sanction among other methods of establishing value for total loss, "proof of the value of the vessel as a going concern".

That test is recognized in the English law, namely "what is her value to the owner as a going concern at the time she was lost." *Marsden on Collisions,* 6th Ed., p. 119. *The Harmonides,* 1903 P. D. 1.

Unfortunately, there has not been adduced any tangible evidence on which to make a computation of the vessel's earnings, past or present. It is known that her original cost was $540,440 in 1900; and her usefulness may possibly have extended to 1940, although her services would have been restricted by the requisition until March 1, 1920.

As the *Proteus* represented an investment of $630,000 (first cost plus renewals in 1909) at the time of loss, on which the owners might expect a clear net profit of six per cent (compounded) for each year during a balance of twenty-five years, (until 1943), that expectancy would be equal to a cash payment of $483,197.40, according to the annuity tables for present value of an annuity of twenty-five years, to yield the profit stated. The premise in this calculation is liberal, in that it does not take into account the depreciated value for eighteen years, nor the accrued profits for that period on the original investment.

XIV. THE TESTIMONY AS TO THE VALUE OF THE *Proteus* GIVEN BY THE PETITIONER'S WITNESSES IS PREFERABLE TO THAT OF THE WITNESSES WHO TESTIFIED ON BEHALF OF THE RESPONDENTS.

The three "experts" who testified under the reproduction and depreciation theory on behalf of the *Proteus* interests obtained their excessive results by magnifying the cost of reproduction (they each apparently accepted the $1,750,000 estimated by Mr. Palen without question), and they also misapplied the second important factor of rate of depreciation per year.

That method (reproduction and depreciation) gives a wide latitude for inaccuracies and miscalculations. If the system is to be used, however, the figures should at least fairly represent the factors on which the calculations are to be based. Although the three experts valued the *Proteus* on behalf of the respondents under this theory, and Mr. Martin particularly adopted an empirical formula for that valuation (which was exclusively accepted by the Circuit Court of Appeals), it is apparent from an examination of their testimony, that Messrs. Raymond, Smith and Martin carried many inaccuracies and errors into their calculations, which destroys the exactitude, and even the proximate correctness, of the results. These errors have been commented on particularly in the previous text in respect of application of the rate of depreciation, and Mr. Martin's faulty arithmetic has also been indicated. *Post*, p. 78.

Two of these gentlemen were shipowners, and presumably interested in maintaining high valuations. The third (Mr. Martin) was a professional surveyor.

The high values placed on the *Proteus* by Messrs. Raymond and Smith, is hardly reconcileable with the recommendation which the Association of which these gentlemen are members, made to the Senate Committee on February 9, 1920, for the sale of Shipping Board vessels at $100 a ton. *Record,* p. 68. The date of that recommendation is significant, because the sale value there sought was as of a date *prior* to the date of redelivery of floating equipment which had been controlled by the Railroad Administration. If that valuation may be taken as a test, the *Proteus,* on redelivery to the Southern Pacific Company, if not lost, would have been valued at less than $400,000, or less than a third of the amount which these same witnesses advocated as her value in August, 1918.

The valuations which had been placed on two other vessels, the *Havana* and the *Saratoga,* by a Government "Board of Appraisal", of which two of the petitioner's witnesses had been members (Gillmor and Swasey), were cited as showing the high value at which vessel property was being rated at the time. These two vessels were of an entirely different type to that of the *Proteus,* being very much larger and more modern. The valuation placed on them by the Board of Appraisal was testified to be "entirely consistent with $650,000 for this one" (meaning the *Proteus*). *Record,* p. 99.

At least two of the three witnesses who testified on behalf of the petitioner were entirely disinterested. *Rec-*

ord, pp. 81, 107. It is clear from the text of their testimony that they had given the subject very careful consideration, based on complete knowledge of the *Proteus,* and although they applied the method of reproduction and depreciation, they also took all other relevant factors into consideration in arriving at their valuations, which were as follows

Captain H. G. Gillmor, $650,000, *Record,* p. 187.
A. L. Swasey, $611,000, *Record,* p. 188.
R. W. Morrell (*maximum*) $630,000; (*minimum*) $564,000, *Record,* p. 181.

A mean of these figures would be about $630,000, which is $120,000 less than the figure fixed by the Commissioner and confirmed by the District Court, but it is $595,000 less than the high valuation placed on the *Proteus* by the Circuit Court of Appeals, under the reproduction theory, as applied by that Court.

The Commissioner heard and saw all of these witnesses. His conclusions as to them are expressed in his statement:

> "I must consider all of the opinions, *having in mind the standpoints from which they were given* and all of the facts and circumstances. The result of such consideration is that *the views of the petitioner's witnesses seem to me more nearly in accord with the probabilities in the case at bar than those of claimant's witnesses* but it is difficult to make any satisfactory finding of fact." (Italics ours.) *Record,* p. 190.

The District Court was also impressed by the thoroughness with which the petitioner's witnesses discussed the subject. *Record,* p. 195.

On the other hand, the Circuit Court of Appeals obviously preferred the statements of the witnesses for the respondents, and did not give the testimony of the petitioner's witnesses any weight whatever. *Record,* p. 230.

It is submitted that the opinion of the experienced Commissioner as to the disinterestedness and fitness of the witnesses who appeared before him personally should be accepted,* and preferred to the opinion of the Circuit Court of Appeals, which did not have that advantage.

Davis v. *Schwartz,* 155 U. S. 631 (1895).
Adamson v. *Gilliland,* 242 U. S. 350 (1917).
Mason v. *United States,* 260 U. S. 545 (1923).
Cramer v. *United States,* 261 U. S. 219 (1923).

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* The average of the valuations given by the petitioner's witnesses ($630,000) is a very liberal allowance as compared to the deadweight tonnage valuations fixed by the Government during this period.

The deadweight tonnage of the *Proteus* was stated by the builder to be 3830, and by counsel as 3800. *Record,* pp. 59, 132.

The Court of Claims found the value of *new* tonnage to be $200 per deadweight ton at least up to February, 1918, *ante,* p. 91. At that rate the value of a *new Proteus* would be $766,000 (at 3830 d.w.t.). Depreciation for her age of 18 years at the low rate of 2½% (45% off) would bring her value down to $421,300 ($766,000—$344,700).

The Shipping Board's average value of $175 per deadweight ton for *new* tonnage, *ante,* p. 61, would give the value *new* as $670,250, and depreciation for age would reduce it further.

The Advisory Board's figure of $175 per deadweight ton, Class 5, Appendix No. 111, *post.,* p. 141, would give the same ($670,250); but taking off 10% for non-classification, that figure would be reduced to $603,225. Cf. *ante,* pp. 110-111.

The District Court's award of $750,000 (plus interest) was more than liberal, according to these standards.

XV. THE CONCLUSIONS OF THE TWO RESPONDENTS, SOUTHERN PACIFIC COMPANY AS OWNER, AND THE DIRECTOR GENERAL OF RAILROADS AS DEMISE CHARTERER AND INDEMNIFIER, AS TO THE VALUE OF THE *Proteus* AT THE TIME OF HER LOSS, AND AS EVIDENCED BY THE SETTLEMENT MADE BETWEEN THE TWO PARTIES DISCUSSED UNDER THE FIRST POINT, SHOW CONCLUSIVELY THAT THE VALUATION FIXED BY THE CIRCUIT COURT OF APPEALS IS EXCESSIVE.

The settlement which was made prior to the decision of the Circuit Court of Appeals for the Second Circuit has been discussed at length under the First Point. Reference to that settlement here is made only to show that the Director General of Railroads (through his assistants) carefully investigated the question of value of the *Proteus* to the Southern Pacific Company at the time of the loss of the *Proteus*, and he arrived at a figure which he stated as a lump sum of $885,000 for two vessels, these being the steamship *Proteus* and the lighter *Confidence*. The amount claimed for the *Confidence* was $16,664, so that it is a fair inference that the value of the *Proteus* may be assumed to have been fixed at the sum of $868,336. *Commission*, p. 64.

The figure representing the value of these two vessels was fixed for the purpose of concluding a final adjustment of all the claims which the Southern Pacific Company was making against the Government, and, final

adjustment was made on that basis in a lump sum amount. *Commission,* p. 64.

It further appears that there was not any allowance for the item of "interest" made on this amount, *Commission,* p. 66; so that, the lump sum figure was inclusive of any claim which may have been made for interest. *Commission,* p. 66.

As to the method of arriving at the valuation for the *Proteus,* Director-General Davis testified:

> "A. The Director General and his Staff and also Mr. Wright had knowledge of the allowance made by the United States District Court in this litigation, and that was one of the matters considered in making the adjustment, but I cannot say that it was controlling.
>
> "B. There was a very careful examination, from all available sources, made as to the actual value of the *Proteus* at the time of its loss, and while, as heretofore stated, the finding of the court was one of the items which influenced the result the final result was obtained from all sources of information available to the Director General." *Commission,* p. 66.

The lump sum payment was made (including the amount paid for the steamship *Proteus*) from the Director General of Railroads to the Southern Pacific Company on December 19, 1922. *Commission,* pp. 64, 97.

The elapsed time from the date of loss of the *Proteus,* which was August 19, 1918, to the date of payment for the loss, December 19, 1922, would be four years and four months.

Assuming, for the purposes of comparison of the valuation of the *Proteus* as fixed by the Court below, that interest at the rate of six (6) per cent should be paid on the amount representing the value of the *Proteus* from the date of loss to the date of payment, the item of interest would be twenty-six (26) per cent.

The "lump sum" of $868,336 would include twenty-six per cent interest, therefore; and, if this interest should be segregated from the total (by dividing $868,336 by 126%), the interest item alone would amount to $179,180.45, leaving as the principal the sum of $689,155.55.

The District Court awarded the sum of $750,000, "with interest from the date of the loss"; and, therefore, the decree carries with it interest on the valuation of the *Proteus* from August 19, 1918 until paid.

The interest on the amount awarded by the Commissioner and confirmed by the District Court ($750,000) from the date of the loss to the date of settlement between the Director General of Railroads and the Southern Pacific Company (December 19, 1922) would amount to $195,000, making the total of the principal and interest up to that date (December 19, 1922) the sum of $945,000.

Again, under the award made by the Circuit Court of Appeals ($1,225,000), which also carries interest at six per cent, the item of interest alone from the date of loss to the date of settlement by the Director General of Railroads would amount to $318,500, making the total of principal and interest up to that date (December 19, 1922) $1,543,500.

It will thus be seen that the lump sum payment which the Director General of Railroads made in settlement

with the Southern Pacific Company for loss of the *Proteus* ($868,336) was $76,664 less than the award of the District Court (including interest); and $675,164 less than the valuation fixed by the Circuit Court of Appeals (including interest) as the measure of the loss.

Apart from the legal effect of that settlement as discussed under the First Point herein, the evidence adduced under the commission issued by order of this Court has established a fact which assumes a most important, if not controlling, bearing on the question of value of the *Proteus* as of the date of her loss.

Although the evidence may not be explicit enough to prove that the Southern Pacific Company specifically agreed to the item as allocated by the Director General of Railroads to represent the value of the *Proteus*, it is a fair assumption that the Southern Pacific Company by its acceptance of the lump sum settlement thereby actually agreed on that valuation.

As to the Director General of Railroads, on the other hand, the proof is clear, to the effect that after "very careful examination, from all available sources, made as to the actual value of the *Proteus* at the time of its loss", *Commission*, p. 66, the final result "obtained from all sources of information available to the Director General", was a fixing of a value for the *Proteus* which was in fact less than the value placed on that vessel by the Commissioner and the District Court.

The value thus fixed is so out of all proportion to the value as fixed by the Circuit Court of Appeals as to make it obvious that the latter is unreasonable.

It is submitted that in any event the maximum value that may now fairly be placed on the *Proteus* is the amount which the Director General paid the Southern Pacific Company and which the latter received in full satisfaction, namely, $689,155.55, plus interest from August 19, 1918, the date of loss; or the sum of $868,336, plus interest from December 19, 1922 until paid.

LAST POINT.

THIS COURT SHOULD REVERSE THE DECISION OF THE CIRCUIT COURT OF APPEALS AS TO THE VALUATION OF THE *Proteus*, AND SHOULD AFFIRM THE DECREE OF THE DISTRICT COURT.

Respectfully submitted,

WILLIAM H. MCGRANN
JOHN M. WOOLSEY
Counsel for Petitioner.

New York City,
January, 1925.

Appendices

Nos. I.—III.

APPENDIX NO. I.

THE STATUTES AND PROCLAMATIONS ESTABLISHING FEDERAL CONTROL OF RAILROADS.

APPENDIX NO. I.

The Statutes and Proclamations Establishing Federal Control of Railroads.

The "*Act making appropriations for the support of the army for the fiscal year ending June 30, 1917, and for other purposes*" contained among others the following provisions:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."
>
> 39 U. S. Statutes at Large, 645.

On December 26, 1917, under this authority the President issued a proclamation taking over possession and control of rail and water transportation systems in the United States,

> "From and after twelve o'clock on said twenty-eighth day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said Director without further act or notice. But for the purpose of accounting said possession and control shall date from twelve o'clock midnight on December 31, 1917."
>
> 40 U. S. Statutes at Large, 1735.

The President's proclamation appointed a Director General of Railroads and the seizure was stated to be without prejudice to the rights of the owners of railroads and others having interest in them, to have just compensation for their use by the Government.

Proclamation of December 26, 1917.

The subsequent Act of March 21, 1918, entitled "*An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners and for other purposes*", commonly known as the Federal Control Act authorized the President to make agreements with the railroads as to the basis of their operation and compensation to be paid to them therefor, conferred further powers on the President, and provided for the eventual termination of Federal control at some date not exceeding one year and nine months next following the date of the proclamations of peace by the President.

40 U. S. Statutes at Large, 451.

Both by the President's proclamation of December 26, 1917, and by Section 10 of the Federal Control Act, no process, mesne or final, could be levied against any railroad property under the Federal control.

Thus proceedings *in rem* against vessels in possession of the Director General of Railroads were forbidden.

By General Order No. 60 of the orders of the Director General of Railroads, suits arising from the operation of a railroad or its auxilliary fleet were to be brought against him by name.

APPENDIX NO. II.

RELEVANT PORTIONS OF AGREEMENT OF FEBRUARY 19, 1919, BETWEEN SOUTHERN PACIFIC COMPANY AND ITS SUBSIDIARIES AND THE DIRECTOR GENERAL OF RAILROADS.

APPENDIX NO. II.

Relevant Portions of Agreement of February 19, 1919, Between Southern Pacific Company and The Director General of Railroads.

The relevant provisions of the agreement of February 19, 1919, between the Director General and the Southern Pacific Company, which is printed in full as Exhibit 1 to Mr. Kruttschnitt's testimony, *Commission*, pp. 9-36, and as Exhibit A to Mr. Davis' testimony, *Commission*, pp. 68-96, are as follows:

> "(d) Wherever in this agreement the words 'Federal control' are used to indicate a period of time, they shall be understood as meaning the period from 12 o'clock midnight of December 31, 1917, to and including the day and hour on which said control shall cease.
>
> "(j) 'Railway', 'railway property', 'railway operation,' 'railway revenue and expenses', wherever used in this agreement shall, unless from the context a contrary intent plainly appears, be deemed to include the water lines or water craft of any of the Companies whose system of transportation includes water lines or water craft."
>
> *Commission, Agreement,* Sec. 1, *Subdivisions* d and j, p. 14.
>
> "Section 2—Property Taken Over.
>
> "Sec. 2. The railroads and systems of transportation of the Company and of its said Affiliated Companies of which the President has taken over possession, use, control, and operation shall be considered as including:

"(a) The following roads and properties:

"1. The combined rail and water system of transportation of the Southern Pacific Company, consisting of railroads, steamships and other water craft, * * *"

"Also the ocean steamships owned and operated by the Southern Pacific Company under the name of Southern Pacific Co.—Atlantic Steamship Lines—Morgan Line, and under the name of Southern Pacific Co.—Atlantic Steamship Lines—Havana Line, described as follows:

"Passenger and freight steamers, Chalmette, Comus, Creole, Excelsior, Momus, *Proteus;** freight steamers, El Alba, El Almirante, El Capitan, El Cid, El Dia, El Mar, El Monte, El Mundo, El Norte, El Occidente, El Oriente, El Paso, El Rio, El Siglo, El Sol, El Sud, El Valle, oil tank steamers Topila, and Torres; tugs El Amigo, El Chico, El Rey; steam barges Manhattan and Despatch; and sixty barges operated in connection therewith, including all rights in and to the use of wharves, docks, and water front terminals used in connection with the operations of said fleet at New York, New York, Galveston, Texas, New Orleans, La., and Havana, Cuba; and all other equipment and appurtenances commonly used upon or operated as a part of the Company's system of water transportation between the port of New York, and the port of Galveston, between the port of New York and the port of New Orleans, and between the port of New Orleans and the port of Havana, Cuba."

Commission, Agreement, Sec. 2, *Subdivisions* a, p. 15.

"(a) The Companies accept all the terms and conditions of the Federal control act and any regulation or order made by or through the President under authority of said act or of that portion of the act approved August 29, 1916, referred to in paragraph (a) of the preamble to this agreement which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation; and they further and expressly accept the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction and discharge of any and all claims and rights, *at law or in equity,* which they or any of them now have or hereafter can have, otherwise than under this agreement, against the United States, the President, the Director General, of any agent or agency thereof, for compensation under the Constitution and laws of the United States for the taking possession of their property, and for the use, control, and operation thereof during Federal control, and for any and all loss and damage to their business or traffic by reason of the diversion thereof or otherwise which has been or may be caused by said taking or by said possession, use, control, and operation."

Commission, Agreement, Sec. 3, *Subdivision* a, p. 18.

"(i) The Director General shall pay, or save the Companies harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during Federal control, except the expenses which under this agreement are to be borne by the Companies. He shall also pay or save the Companies harmless

from all rents called in the monthly reports to the Commission equipment rents or joint-facility rents, and all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon, the Companies by reason of any cause of action arising out of Federal control, or of anything done or omitted in the possession, operation, use, or control of the companies' property during Federal control, except judgments or decrees founded on obligations of the Companies to the Director General or the United States."

Commission, p. 24.

"(k) In carrying out the provisions of paragraphs (a), (b), (c) and (d) of this section and the provisions of section 6 hereof the Director General shall not settle any claim by or against the Companies against the objection in writing of the president or of any other duly authorized officer of the Companies. The conduct of all litigation before any court or commission arising out of such disputed claims, or out of operation prior to Federal control, shall be in charge of the Director General's legal force and the expense thereof shall be paid by the Director General; but the Companies may, at their own expense, employ special counsel in connection with any such litigation.

"(l) Nothing in this agreement shall be construed as inconsistent with the provision in section 10 of the Federal control act that no process, mesne or final, shall be levied against any property under Federal control, nor as a waiver by the United States of any claim that might otherwise be made by it that the rights of any State or

subdivision thereof or of any individual or corporation have been abrogated or suspended by the taking over of the Companies' property or by Federal control."

Commission, Agreement, Sec. 3, *Subdivisions* i, k and l, pp. 23, 24.

"(e) If during Federal control any of the property, other than floating equipment, described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged otherwise than by fire or public enemies, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss; and the cost of restoration or replacement, or said value or damages, as the case may be, shall be charged to annual railway operating expenses; it being understood that extraordinary losses caused by floods, explosions, train wrecks or accident are included in the matters covered by this paragraph, while ordinary losses due to such causes are included in the matters covered by paragraph (a) of this section; Provided, however, that if the Commission on application of the Director General or the Company and after giving due consideration to the practice of the Companies during the test period in respect to such matters and to any other pertinent facts and circumstances, determines that it is just and reasonable that the said cost or value shall be apportioned or extended over a period of more than one year, this shall be done, and so much of said cost or value as may be apportioned by the Commission, over the period subsequent to Fed-

eral control, shall be charged to the Companies in the final accounting at the end of Federal control and shall be paid by them.

"If, during Federal control, any of the property described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged by fire or marine casualty; or any of the floating equipment described in paragraph (a) of section 2 hereof is destroyed or damaged by war risks while in ocean waters outside of the three mile limit, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss; and the cost of restoration or replacement or said *said* value or damage, as the case may be, shall be charged to annual railway operating expenses, but the same shall not be considered a charge to such expenses for the purposes specified in paragraph (a) of this section."

"In case of any such loss or damage by fire, or marine casualty, the Director General shall, if given written notice of the requirements of any mortgages, equipment lease, or trust on the property so destroyed or damaged, make such restoration or replacement, or pay such value or damage, in such way as to meet the requirements of such mortgage, equipment lease, or trust in the same manner as would have been proper in applying the proceeds of insurance on such property if it had been insured by the Companies against loss or damage in accordance with the terms of such instruments of lien; and a compliance with the

written request of the Company in respect thereof shall be a full acquittance of any obligation of the Director General in the premises."

"The words 'marine casualty' are used herein as applying to floating equipment and as meaning casualties, covered by the usual marine insurance policy, including collision clause, and losses or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosion, bursting of boilers or breakage of shafts or through carrying explosives."

* * * * * *

"The Director General shall not be liable to the Companies for any loss or damage due to the acts of public enemies, except as provided in this paragraph (e) as to floating equipment.

"(h) * * *

"Some of the steamships enumerated in paragraph (a) of Section 2 hereof, having been on January 1, 1918, under charter to different departments of the United States Government the Company hereby subrogates the Director General to all its rights and obligations under any and all such charter-parties, all charter hire, however, accruing under any of the same for the period prior to January 1, 1918, to be paid to the Company; and the Director General shall enforce the rights of the Company including the right, if any, to have such steamships returned by the charterer in as good order and condition as when received."

Commission, Agreement, Sec. 5, *Subdivisions* e and h, pp. 26, 27, 28.

"Sec. 9. (a) At the end of Federal control all the property described in paragraph (a) of section 2 hereof *shall be returned* to the Companies, together with all repairs, renewals, additions, betterments, replacements, and road extensions thereto which have been made during Federal control, *except as any part thereof may have been destroyed or retired and not replaced, in which case the provisions of section 5 hereof shall govern* and except that the Director General shall not be obliged, otherwise than as provided in paragraph (1) of said section 5, to restore or replace property destroyed or damaged by the acts of public enemies." (Italics ours.)

* * * * * *

"(f) After Federal control no claim by or against the Director General shall be settled by the Companies against the written objection of the Director General or the Attorney General of the United States. The conduct of all litigation before any court or commission arising out of such disputed claims or out of operations during Federal control shall be in charge of the Companies' legal force and the expense thereof shall be paid by the Companies; but the Director General or the Attorney General may, at the expense of the United States, employ special counsel in connection with any such litigation."

Commission, Agreement, Sec. 9, *Subdivisions* a and f, pp. 33-34.

APPENDIX NO. III.

STEAMER VALUATIONS.

APPENDIX No. III.

Steamer Valuations.

(Steel & Iron)

(Classed 1 in American Records or 100 A 1 in Lloyds Register)

American, Neutral and Japanese

Cargo Steamers—A 1 Steel:

Class 1—Not over 1 yr. old per deadweight ton..	$200
Class 2—Over 2 and not over 5 yrs. old per deadweight ton	195
Class 3—5 to 10 years old per deadweight ton.....	190
Class 4—Over 10 years and not over 15 per deadweight ton	180
Class 5—Over 15 years and not over 20 per deadweight ton	175
Class 6—Over 20 years and not over 25 per deadweight ton	160
Class 7—Over 25 years per deadweight ton.....	150

Tank Steamers:

Class 1—Not over 1 yr. old per deadweight ton..	250
Class 2—Over 2 and not over 5 yrs. old per deadweight ton	240
Class 3—5 to 10 years old per deadweight ton....	230

Class 4—Over 10 years and not over 15 per deadweight ton 210

Class 5—Over 15 years and not over 20 per deadweight ton 187.50

Class 6—Over 20 years and not over 25 per deadweight ton 165

Class 7—Over 25 years per deadweight ton..... 150

British, French, Italian and Greek ⅓ off the above amounts.

10% off if not classed.

In the case of a steamer being rebuilt or furnished with new boilers, 60% of the cost of the improvements or betterments to be added to the value as of the year the expenditure is made. This does not apply to expense of ordinary repairs or upkeep.

Deduct 20% on wooden steamers.

In the case of steamers of foreign friendly flags, if charterer be an American citizen or corporation under terms which require the charterer to furnish War Risk Insurance, in the event of the charter party providing the amount of war insurance, which must be furnished by the charterers, the Bureau can write policies up to such an amount.

Recommended by:

(Signed) Hendon Chubb, W. N. Davey,
Advisory Board.

To William C. Delanoy, Director Bureau of War Risk Insurance, Washington, D. C.

APPENDIX NO. IV.

STEVENSON-TAYLOR DEPRECIATION TABLE.

DEPRECIATION TABLE

REMAINDERS AFTER DEDUCTING DEPRECIATION UNIT OF VALUE, 1000

BASED ON VESSELS HAVING BEEN WELL CARED FOR—SPECIAL DEPRECIATION OR APPRECIATION DEPENDING ON CONDITIONS

Age Years	Steel Steamers Salt Water Service	Wood Steamers Salt Water Service	Motor Boats		Steel Steamers Fresh Water Service	
			Hulls, etc.	Engines		
1	989	980	975	950	995	
2	975	955	930	888	985	
3	957	926	860	808	970	
4	931	888	790	700	951	
5	900	848	720	550	930	
6	864	810	650	300	906	
7	822	770	580	150	879	
8	779	730	510	70	852	
9	739	690	440	25	826	
10	700	652	370	0	800	
11	665	612	300		773	
12	635	575	240		749	
13	603	538	190		724	
14	570	501	148		700	
15	540	465	110		675	
16	511	430	84		650	
17	481	395	62		627	
18	452	361	44		604	
19	425	330	30		578	
20	400	301	10		555	
21	377	272			530	
22	354	247			506	
23	331	222			482	
24	310	200			459	
25	289	180			435	
26	266	161			413	
27	245	146			390	
28	226	131			368	
29	205	117			346	
30	185	105			325	
31	165				305	
32	145				284	
33	127				264	
34	109				245	
35	90				228	
36	71				210	
37	52				192	
38	36				177	
39	18				163	
40	0				150	

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923, No. 607.

STANDARD OIL COMPANY (NEW JERSEY),
Petitioner,

AGAINST

THE SOUTHERN PACIFIC COMPANY AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a proceeding for limitation of the liability of Standard Oil Company (N. J.), as owner of the steamship *Cushing*, with which has been consolidated the proceeding for limitation of liability by the Southern Pacific Company, as owner of the steamship *Proteus*, and the Director General of Railroads, who was in possession of the *Proteus* under the Act of August 29th, 1916, and the proclamation of the President of December 26, 1917, at the time of the collision between the *Cushing* and the *Proteus*. The collision occurred August 19, 1918, and resulted in the sinking and total loss of the *Proteus*.

The District Court for the Southern District of New York (L. Hand, *J.*) held both vessels in fault and referred the question of damages to a commissioner, who found the value of the *Proteus* at the time of the collision to be $750,000. Mack, *C. J.*, confirmed the report,

and a final decree was entered apportioning the damages, giving the owners of the cargo a full recovery, and striking a balance in favor of the Southern Pacific Company and the Director General of Railroads of $200,448.89, "being one half of the difference between the amount of their damages * * * interest * * * and costs, and the damages sustained by Standard Oil Company (N. J.) as owner of the *Cushing* with interest * * * and costs, including the amount paid by the Standard Oil Company (N. J.) to the cargo claimants" (Record, Vol. I, fols. 2692-3).

The Circuit Court of Appeals affirmed the decision on the merits, and increased the value of the *Proteus* to $1,225,000, which, on the apportionment of damages, would give the Southern Pacific Company and the Director General of Railroads a recovery of about $500,000.

I. No novel or important question of law is involved in this application.

The only question raised is the value of the *Proteus*.

All the witnesses on both sides adopted the same method of determining value, viz., the cost of reproduction less 18 years' depreciation. This is the method adopted by this Court in the rate-making cases, *Knoxville* vs. *The Knoxville Water Company*, 212 U. S. 1, and *Denver* vs. *Denver Water Company*, 246 U. S. 178. In the latter case Mr. Justice Pitney said:

"What we have said establishes the propriety of estimating complainant's property on the basis of present market value as to land, and reproduction cost, less depreciation, as to structures" (p. 191).

The claimant's witnesses were Martin, a marine surveyor and appraiser of more than 35 years' experience, who was a member of the Ocean Advisory Board on Just Compensation (1586), Smith, President of the New York & Cuba Mail Steamship Company (Ward Line) (1636), and Raymond, President of the Clyde and Mallory lines (1758). Their valuations ranged from $1,225,000 to $1,350,000 (Commissioner's report, 2507, 2513, and 2515).

The petitioner's witnesses were Morrell, employed in the Construction Department of the Standard Oil Company (1829), Gillmor, a naval architect and member of the Joint Merchant Vessel Board, which appraised vessels that might be requisitioned by the Government (1891-1900 and 1949 and 1951), and Swasey, vice-president of Hereshoff Manufacturing Company (2045). Their valuations ranged from $611,000 to $630,000 (Commissioner's report, 2520, 2525 and 2528).

The difference in the estimates of the two sets of witnesses was due either to a different replacement cost or a different rate of depreciation or both. The witnesses for the *Proteus* took the replacement cost as $1,750,000. Mr. Palen, vice-president of the Newport News Company, gave the precise cost of reproduction as $1,755,450 (2127-8).

Morrell, for the petitioner, started with $1,670,000 as the cost of reproduction (1850-2) and used a depreciation rate of 4% for 14 years and 2½% for four years (1853). Gillmor conceded that reproduction less depreciation was a correct rule (1936, 1937) and said that "2½ times the first cost would be a liberal reproduction cost of the *Proteus*" (1943). This would make the reproduction cost

$1,375,000, and he fixed her value at .452 of this cost in accordance with a table which he had used in appraising vessels of various ages. Swasey thought $1,400,000 "about right" as a replacement value and using the same table as Gillmor "depreciated the price to $611,000" (2058-9).

The *Proteus* witnesses adopted 2½% to 3% as a fair and reasonable rate of depreciation, taking into consideration the extraordinarily high standard of up-keep maintained by the Southern Pacific Company for its vessels (Martin, 1609 and 1622-5; Raymond, 1791; Smith, 1671).

The difference between the conclusion of the Commissioner and Judge Mack on the one hand and that of the Circuit Court of Appeals on the other, is that the Circuit Court of Appeals regarded the estimates of Martin, Raymond and Smith as more weighty than those of the petitioner's witnesses. In the District Court the learned Circuit Judge conceded that "the cost of reproduction less depreciation has been commonly adopted as a standard for rate-making purposes" (2568), but he noted a recent "tendency among legal and economic writers to bring to the fore the prudent investment standard" (2569). He did not, however, follow this out, but contented himself with *discounting* "the cost of reproduction" (2574).

The Circuit Court of Appeals said:

> "We think the greater weight of persuasive testimony favors the proof offered on behalf of the *Proteus* as to value and that the rate of depreciation was fair and reasonable under all the circumstances" (Opinion).

Thus it is evident that there is no novel or important question of law raised by this application. It may seem startling that a vessel which cost less than $600,000 in

1900 should be worth $1,225,000 eighteen years later, but that was what happened all over the world during the war. An interesting example of increased values is the case of the *Havana* and *Saratoga,* two steamships of the Ward Line built in 1906 at a cost of $900,000 each (Smith, 1651, 1654-5) and appraised in 1917 by the Joint Board, of which the petitioner's witness Gillmor was a member, at $2,240,000 each and paid for at that rate by the Government (1653-7).

II. THERE IS NO MERIT IN THE PETITIONER'S CONTENTION THAT THE SOUTHERN PACIFIC COMPANY IS BARRED FROM RECOVERY IN CASE IT HAS MADE A SETTLEMENT WITH THE DIRECTOR GENERAL OF RAILROADS.

The petitioner's argument is that the Southern Pacific Company is "the innocent injured party seeking only to recover for the value of the *Proteus*" (Brief, p. 29); that the Standard Oil Company and the Director General of Railroads were "joint tort feasors causing the loss of the Southern Pacific Company's steamer *Proteus*" (Petition, p. 5; Brief, p. 30); that "it has come to the attention of counsel in this case, through proper and reliable sources, that a final settlement had been arrived at between the Railroad Administration and the Southern Pacific Company by which the liability of the Railroad Administration for the loss of the *Proteus* has been finally satisfied and extinguished by a payment, credit or adjustment, on the basis of the value found by the Commissioner and confirmed by the District Court, namely, $750,000" (Petition, pp. 5-6); and that "the claim which it may have had for the same loss against the other tort feasor, Standard

Oil Company (New Jersey) has thereby been extinguished" (Brief, p. 30).

"Naturally the facts just noted are not included in the record on appeal here" (12th article of the Petition, p. 7).

The petitioner naively asks for a writ of *certiorari*, not merely on the grounds usually stated in such applications, but for the reason that "the peculiar circumstances which have arisen during the pendency of this litigation * * * justify a further inquiry into the facts, to determine their legal effect, and their bearing on the measure of damage for which your petitioner may be liable" (Petition, p. 11).

1. A writ of *certiorari* brings up the record, and nothing outside the record. *Harris* v. *Barber*, 129 U. S. 366; *McClellan* v. *Carland*, 217 U. S. 268.

2. The statements of the petition and brief *dehors* the record do not sustain the petitioner's contention as to the relation of the parties.

It is certainly a fantastic suggestion that the owner as an innocent party was dealing with the Director General as one of two joint tort feasors.

If the Southern Pacific Company is "an innocent party" then it must be in the same situation as the owners of cargo and entitled to a decree for the full amount of its damages as against the petitioner.

3. The relations of the Southern Pacific Company and the Director General *inter se se* are no concern of the petitioner. At any time in the course of the litigation, before or after judgment, the Director General of

Railroads could have settled his contractual obligations to the Southern Pacific Company in any way that they might see fit, and either the Southern Pacific Company or the Director General, in making a settlement, might reserve its rights as against the Standard Oil Company.

The petitioner has not even asserted that the Southern Pacific Company released the Director General of Railroads.

4. The relations between the Southern Pacific Company and the Director General did not arise out of tort, but were contractual.

The taking of the Southern Pacific system of transportation under the Act of August 29, 1916, was subject to just compensation being made, and the President's proclamation of December 26, 1917, expressly provided that the Director General should

"enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use and control of their respective properties * * *".

Also, the Federal Control Act of March 21, 1918, provided for just compensation to the carriers and for the making of agreements therefor between the President and the carriers. In Section 1 of this Act it was contemplated

"that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control * * *".

Pursuant to this statute the Director General and the Southern Pacific Company made an agreement which was

put in evidence by the petitioner's counsel, February 3, 1921 (Record, p. 681).

In Section 5(*e*) of this contract it was provided:

"If, during Federal control, any of the property described in paragraph (*a*) of section 2 hereof [this included the *Proteus*] or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged by fire or marine casualty, or any of the floating equipment described in paragraph (*a*) of section 2 hereof is destroyed or damaged by war risks while in ocean waters outside of the three-mile limit, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss, and the cost of restoration or replacement or said value or damage, as the case may be, shall be charged to annual railway operating expenses, but the same shall not be considered a charge to such expenses for the purposes specified in paragraph (*a*) of this section."

The Director General was bound by contract to make compensation to the Southern Pacific Company for the loss of the *Proteus,* and whether he was negligent or not had nothing to do with his obligations toward the Southern Pacific Company.

5. The petitioner has failed to make out a case for extraordinary relief.

It had known the relations of the Director General and the Southern Pacific Company since they filed their petition for limitation of liability July 21, 1919 (98). On the hearing before the Commissioner December 7, 1920 (1582 and 1630), counsel for the petitioner sought to ascertain whether a settlement had been made with the Government. It knew that a settlement was inevitable by virtue of the statutes of the United

States and the contract made between the Director General and the Southern Pacific Company dated February 19, 1919, which the petitioner put in evidence February 3, 1921, and which contained the provision quoted *supra*.

The petitioner was further put on notice by Mack, *C. J.*, in his opinion confirming the Commissioner's report. Referring to the relations of the Southern Pacific Company and the Director General he said:

"The claimant and the Director-General, I assume, have come or will come to an agreement regarding their respective rights as to the interest accruing during the period of requisition. Unless some agreement has been reached, I assume that the Government is entitled to the interest during the period of requisition, and the claimant to its agreed compensation" (2584).

III. THE APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

October, 1923.

CHARLES C. BURLINGHAM,
Counsel for Southern Pacific Company
and the Director General of Railroads.

[redacted]

SUPREME COURT OF THE UNITED STATES

STANDARD OIL COMPANY (NEW JERSEY), Petitioner, AGAINST SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads, Respondents.	No. 607 October Term, 1923

BRIEF FOR RESPONDENTS IN OPPOSITION TO MOTION FOR LEAVE TO TAKE NEW EVIDENCE

This application is for an order (*a*) giving the petitioner leave to take additional evidence in this Court; (*b*) appointing a commissioner to take such evidence orally (Motion Papers, p. 2).

I. THE MOVING PAPERS ARE DEFECTIVE IN THAT THEY FAIL TO STATE (1) PRECISELY WHAT THE PETITIONER WISHES TO PROVE; (2) THE NAMES OF THE WITNESSES TO BE EXAMINED.

The petition for *certiorari*, which is quoted at length in the moving affidavit, alleges that

"it has come to the attention of counsel in this case, through proper and reliable sources, that a final settlement has been arrived at between the Railroad Administration and the Southern Pacific Company by which

the liability of the Railroad Administration for the loss of the *Proteus* had been finally satisfied and extinguished by a payment, credit or adjustment on the basis of the value found by the Commissioner and confirmed by the District Court, namely, $750,000" (Motion Papers, p. 8).

Yet the affiant states that "the petitioner is not in a position to draw up written interrogatories dealing with the matters mentioned in the above quotation from the *certiorari,* which it wishes to bring out as an addition to the record herein" (Article VII, Motion Papers, p. 11).

And further—

"The petitioner does not know, and this deponent as its counsel has been unable to find out with definiteness, just what procedure was followed in connection with the settlement * * * in respect of the value of the steamship *Proteus.* Until the evidence has been somewhat developed, counsel for the petitioner cannot even be certain just what witnesses will have to be examined. It will of course be necessary to examine the Director General of Railroads and some of his employees, but who those employees are counsel does not know. It will probably be necessary also to examine officers or employees of the Southern Pacific Company at New York, whose identity is not known to the petitioner or this deponent, and which can be discovered only by means of the procedure that would become available before a Commissioner appointed by this Court" (pp. 11-2 of the Moving Papers).

The inconsistency of these statements is striking. If the petitioner's counsel has learned "through proper and reliable sources" facts which he wishes to prove, he should be able to name his witnesses now.

If, however, the petitioner did not have material information through "proper and reliable sources" and his petition for certiorari was merely to prepare the way for a roving commission or fishing expedition, it would seem that the writ should be dismissed now. *Furness Withy & Co. Ltd.* v. *Yantsze Insurance Association,* 242 U. S. 430;

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508.

There is nothing in the circumstances of this case to justify the petitioner in disregarding the rules and practice of this Court. Subdivision 2 of Rule XII of the General Rules points out specifically the method in which new evidence on an appeal in admiralty must be taken. It provides that such evidence shall be taken upon interrogatories to be filed by the applicant with notice to the opposite party, "accompanied with a copy of the interrogatories so filed, to file cross interrogatories within twenty days from the service of such notice".

This rule was adopted in 1817 (2 Wheat. vii), and from that time to this, so far as we can ascertain, no testimony has been taken in this Court in admiralty appeals either *viva voce* or by open commission.

Even in a case of original jurisdiction (*State of New Mexico* v. *State of Texas*—April 14, 1924) this Court, in granting a motion to take additional testimony of a witness named, required the testimony "to be limited to the subject matter detailed in his affidavits".

II. THE TESTIMONY SOUGHT TO BE OBTAINED IS WHOLLY IMMATERIAL.

The petitioner seeks to take testimony to prove a settlement between the Southern Pacific Company and the Director General of Railroads in order that it may invoke the rule that a settlement by a third party with one of two joint tort feasors releases the other joint tort feasor. But the rule which the petitioner would invoke has no application to this case.

As pointed out on pages 3 and 4 of the moving affi-

davit herein, the transportation system of the Southern Pacific Company, including the steamship *Proteus*, was taken into the possession and control of the Director General, pursuant to the Act of Congress of August 26, 1916, and the Proclamation of the President of December 26, 1917. The Southern Pacific Company thereupon became entitled to just compensation for the property so taken by the United States by eminent domain. By the Federal Control Act of March 21, 1918, certain principles were laid down with regard to the method of arriving at just compensation, and by the President's Proclamation of March 29, 1918, the Director General was authorized to enter into agreements with carriers as to such just compensation. Such an agreement was entered into between the Director General and the Southern Pacific Company.*

By the "Transportation Act, 1920", Section 202, the President was directed "as soon as practicable after the termination of Federal control" to "adjust, settle, liquidate, and wind up all matters, including compensation, and all questions and disputes of whatsoever nature, arising out of and incident to Federal control". The petitioner's position is that a settlement pursuant to that statute between the Southern Pacific Company and the Director General, acting for the President, operates to relieve the petitioner from all liability whatsoever for its negligence in sinking the *Proteus*.

From the time the Director General assumed control the Government held the property, not as a demise charterer, as the petitioner suggests (p. 4), but by eminent domain, as is shown by *Du Pont De Nemours & Co.* v. *Davis*, decided by this Court April 7, 1924, and *North Carolina*

* The agreement was offered in evidence by petitioner's counsel and is marked "Petitioner's Ex. 1, 2/3/21, G. J. Z." (Record, Vol. 2, p. 681). As it was omitted from the record, we annex to this brief an abstract of it, marked "A".

R. R. v. *Lee,* 260 U. S. 16. In the latter case this Court said:

"The Government operated this railroad not as lessee, but under a right in the nature of eminent domain."

And this relation was not changed by the fact that an agreement was reached as to the method of arriving at just compensation.

The right of the Southern Pacific Company to just compensation, as fixed by contract, was its only right against the Director General in respect of its property taken over by him. The Director General assumed complete possession and control and owed the Southern Pacific Company no duty as to the manner of use of the property. His only obligation was to make proper compensation.

It is well settled that where property is taken by eminent domain, with due formalities, the owner of the property cannot sue the taker in tort, but is limited to his remedy for compensation.

With respect to the Southern Pacific Company the Director General committed no tort, no matter how negligently his employees may have operated the *Proteus,* and, therefore, the Director General was not a tort feasor at all with respect to the Southern Pacific Company.

Even if it be assumed that one who has taken property by eminent domain may still owe a duty to the owner as to the manner of use of that property, the Director General could not be sued in tort, for he was but an arm of the United States, and the immunity of the sovereign was waived only to the extent of "liabilities ordinarily incident to the operation of carriers", *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554, 559. It was only as to third parties dealing with the Director General as a common carrier that the bar of the sovereign's im-

munity was let down. As to all others, including the Southern Pacific Company, it remained.

Any settlement to bring into operation the rule the petitioner invokes must be of an obligation that is necessarily tort. It is not enough that the obligation *might* be tort.

Even if the Director General were liable in tort to the Southern Pacific Company that company could disregard the tort and rely upon its right to just compensation for the loss of the *Proteus*. Any tort claim that the Southern Pacific Company might have had against the Director General was clearly waived or turned into a contract liability when on February 19, 1919, *after the loss of the Proteus* on August 19, 1918, it made its contract with the Director General. By that contract he agreed to make good the loss of the property destroyed by "marine casualties" defined as "casualties covered by the usual marine insurance policy including collision clause", and the Southern Pacific Company accepted the "obligations of the Director General in this agreement * * * in full adjustment, settlement, satisfaction, and discharge" of all claims for compensation and "for the use, control, and operation" of the property during Federal control (Appendix A, Sect. 5).

In any event the petitioner and the Director General were not *joint* tort feasors. It is true that the negligence of the Director General contributed with that of the Standard Oil Company to the collision, but it does not follow that the parties were *joint* tort feasors. Persons are not *joint* tort feasors merely because their acts have contributed to a single damage. There must be some unity of interest, common design, purpose or concert of action—"they must in fact or in law have committed the same wrongful act" (Salmond's Law of Torts, p. 70).

The most recent decision on this point dealing with collisions is that by the English Court of Appeal in the *Koursk*, decided February 22, 1924, reported in 40 Times Law Reports, 399.

Lord Justice Bankes said:

"It is no doubt quite common to speak of each of two separate tortfeasors as joint tortfeasors in the sense that where each has contributed to the injury complained of each is liable for the whole of the damage done. In my opinion, the use of the expression in such circumstances is inaccurate and misleading."

Lord Justice Scrutton stated the negligence briefly as follows:

"The negligence of the *Koursk* consisted in deviating from her convoy course into the track of the *Clan Chisholm*. The negligence of the *Clan Chisholm* consisted in not reversing her engines when she saw the *Koursk* out of her course."

He then said:

"The two negligences were separate and independent, not taken in concert, or as part of a common plan, and both, in the view of the House of Lords, contributed to the collision."

His conclusion was:

"In my view the *Koursk* and the *Clan Chisholm* were not joint tortfeasors of the same tort, but separate tortfeasors of two different torts."

As to the definition of joint tortfeasors he said:

"I am of opinion that the definition in Clerk and Lindsell on Torts (7th edn., at p. 59) is much nearer the correct view: 'Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design."

This was apparently the view of Judge Addison Brown in the *Hudson,* 15 Fed. 162, where he refers to the fact that in collision cases

"the acts of the two vessels for which they are held liable are not joint, but wholly separate and independent of each other; each vessel being held liable solely on account of its own act of negligence" (p. 168).

Here the *Proteus* was held in fault for hard-aporting her helm; for not signalling her extreme helm movement, and for persisting at full speed ahead (Opinion, Vol. 2, fol. 2755): the *Cushing* for not flashing on her lights, and for failing to give the *Proteus* a wider berth (Opinion, Vol. 2, fol. 2759). These were entirely separate and independent acts of negligence, without common design, or the opportunity for common design.

The rule the petitioner invokes applies only where a settlement is made by a third party, not in privity with either of the wrongdoers. The Southern Pacific Company was not a third party. Between it and the Director General there was a certain privity. There was the relation that exists between the owner and the taker of property by eminent domain. There was privity of contract, and both parties are the joint owners of a judgment against the petitioner. The rule invoked does not apply where there is privity between the parties to the settlement.

In case of collision due to mutual fault the cargo owner is ordinarily barred from recovering from the carrying vessel by the exceptions of the bill of lading. Could it be contended that the cargo owner by accepting a bill of lading releasing the carrying vessel from liability for errors in navigation thereby releases the other colliding vessel? Such is the logical result of the petitioner's argument.

The *Proteus* was a total loss. Her underwriters could have brought suit in their own names. *Liverpool and Great Western Steam Company* v. *Phenix Insurance Company,* 129 U. S. 397. Furthermore, the recovery here includes not only the loss of the hull of the *Proteus,* but also claims of passengers, crew and cargo (Final decree, Record, Vol. 2, pp. 888-896).

It is, therefore, obvious that the true alignment of the parties is not as the petitioner suggests, namely, that the Southern Pacific Company has a claim against two joint tort feasors, the Standard Oil Company and the Director General, but rather that the Director General and the Southern Pacific Company together had a claim against the Standard Oil Company which they held as trustees for hull underwriters, cargo owners, members of the crew, etc. These beneficiaries should not be prejudiced by any transactions between the Southern Pacific Company and the Director General. *The Beaconsfield,* 158 U. S. 303.

The petitioner alleges that the settlement was made between the time of the decision of the District Court and that of the Circuit Court of Appeals (Motion papers, p. 8). We know of no authority holding that if the third party settles with one of two joint tort feasors *after trial and judgment,* such settlement may be made a basis for opening up the judgment and claiming that such settlement, subsequent to trial, releases the other party.

Whatever claim the Southern Pacific Company had against the petitioner was merged in the judgment. If the Southern Pacific's claim against the Director General was in tort, as petitioner asserts, the settlement of such tort claim would not operate to release a *judgment* which the Southern Pacific Company has against another person.

The petitioner's argument carries it no further, in any event, than that the Southern Pacific Company could not recover from the petitioner. It does not follow from the "joint tort feasor" rule, if applicable, that the *Director General* is precluded from recovering from the petitioner.

The petitioner also urges as a ground for leave to take additional testimony that the Southern Pacific Company should not be allowed to claim from the petitioner "more than it has agreed with its demise charterer, the Railroad Administration, as the value of the *Proteus,* and the basis of its damages for the loss of the *Proteus* through that charterer's fault" (p. 9).*

This argument apparently proceeds upon the assumption that the judgment against the petitioner is merely one by the Director General for indemnity, and that, therefore, he should not recover from the petitioner more than he has paid the Southern Pacific Company.

But the judgment here is not one in favor of the Director General for indemnity but is upon the claim of the Southern Pacific Company and the Director General, owner and special owner of the property, respectively. Together they represent the full ownership and interest in the property and are entitled to claim the full value of the property from the third party, the petitioner, irrespective of the contractual or other relations between themselves.

As was said by Wallace, *J.,* in the *Jersey City,* 51 Fed. 527:

"Either the bailee or the bailor may maintain an action against a tort-feasor who injures the property while in the custody of the bailee, and recover the full damages; * * * If, say the court, in *White* v. *Cobb,* 'the suit is

* Whether the petitioner was at fault or not is immaterial. The Director General's obligation to make good in case of loss through collision was absolute as already pointed out.

brought by a bailee or special property man against the general owner, then the plaintiff can recover the value of his special property; but if the writ is against a stranger, then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest in trust for the general owner."

And as pointed out in 2 Bevan on Negligence, 737:

"The bailee, although not liable to the owner, may sue a third party, who has either injured or converted the property, and recover its full value or the full amount of the damage sustained."

This rule has been frequently applied in mail cases, where the United States has been allowed to recover the full value of the property even though it was under no obligation to make good to the sender. *National Surety Co.* v. *U. S.*, 129 Fed. 70; *U. S.* v. *American Surety Co.*, 161 Fed. 149.

In *U. S. Fidelity & Guaranty Co.* v. *U. S.*, 229 Fed. 397, and in *U. S.* v. *U. S. Fidelity & Guaranty Company*, 247 Fed. 16, the United States was allowed to recover the full value of the registered package, although its liability was for only $50.00 per package.

Could it be contended that because a shipper had taken a bill of lading with an agreed value clause (say $100 per package) he would thereby be precluded from recovering from a vessel colliding with the carrying vessel more than $100 per package. Obviously, the other colliding vessel could not avail itself of the agreement as to value between the shipper and the carrying vessel. Nor could the other vessel take advantage of the agreed value, even though the shipper settled with the carrier on the basis of the agreed value.

That situation is not unlike the one presented here.

Inasmuch as the evidence which the petitioner hopes to secure would be immaterial on the appeal the motion prayed for should be denied.

III. THE PETITIONER HAS FAILED TO MAKE OUT A CASE FOR THE EXTRAORDINARY RELIEF PRAYED FOR.

The petitioner knew the relations of the Director General and the Southern Pacific Company from July 21, 1919, when they filed their petition for limitation of liability (Record, Vol. 1, p. 33). The petitioner knew, or is chargeable with knowledge since 1920, that under Section 202 of the Transportation Act, 1920, the President was directed "as soon as practicable" to

"settle" etc. "all matters and * * * disputes * * *, arising out of or incident to Federal control."

Federal control terminated March 1, 1920. The matter of settlement had been brought to the petitioner's attention on or before December 7, 1920, for at the hearing before the Commissioner on that day the petitioner's counsel asked

"whether or not there has been any settlement as between the Government and the owners of the loss of the *Proteus*" (Record, Vol. 2, fols. 1582, 1630).

The petitioner was further put on notice by Mack, *C. J.*, in his opinion confirming the Commissioner's report. Referring to the relations of the Southern Pacific Company and the Director General, he said:

"The claimant and the Director-General, I assume, have come or will come to an agreement regarding their respective rights as to the interest accruing during the period of requisition" (Record, Vol. 2, fol. 2584).

On February 3, 1921, when the petitioner offered in evidence its Exhibit 1 of that date, the agreement between the Director General and the Southern Pacific Company, the petitioner knew that the Southern Pacific Company had accepted "the covenants and obligations of the Di-

rector General in this agreement * * * in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights * * * otherwise than under this agreement, against the United States, the President, the Director General, or any agent or agency thereof, for compensation * * * and for the use, control and operation" of the property during Federal control."

No reason has been suggested why petitioner could not have obtained the same information before as after the appeal was argued in the Circuit Court of Appeals.

In *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, this Court held that the Circuit Court of Appeals had properly refused to allow the case to be re-opened for the purpose of taking newly discovered evidence where there was lack of diligence on the part of the applicant. This Court referred to the

"most salutary rule of law which after parties have had a full and fair opportunity to prepare their case, refuses to permit them to drag out litigation by bringing in new evidence which with due diligence they ought to have discovered before the hearing. The apparent hardship of particular cases should not and can not weigh against the application of this sound principle" (p. 425).

IV. THE MOTION SHOULD BE DENIED AND THE WRIT DISMISSED.

Dated, April 25, 1924.

CHARLES C. BURLINGHAM
RAY ROOD ALLEN
A. HOWARD NEELY
Counsel for Respondents

A

ABSTRACT OF AGREEMENT BETWEEN THE DIRECTOR GENERAL OF RAILROADS AND THE SOUTHERN PACIFIC COMPANY AND OTHER CORPORATIONS.

The agreement, "made" February 19, 1919, is "between Walker D. Hines, Director General of Railroads, • • • *acting* on behalf of the United States and the President under the powers conferred by the proclamations of the President," and the Southern Pacific Company and ten other affiliated companies.

PREAMBLE AND RECITALS

The agreement recites:

(*a*) The President's proclamation of December 26, 1917, and the taking over of the railroads and systems of transportation of the companies;

(*b*) The Federal Control Act of March 21, 1918, authorizing the President to enter into agreements with the companies;

(*c*) The President's proclamation of March 29, 1918, authorizing the Director General to agree with the carriers on the compensation to be paid for the use of their properties;

(*d*) The President's proclamation of January 10, 1919, authorizing Director General Hines to make agreements in connection with Federal control;

(*e*) and (*f*) The certification to the President by the Interstate Commerce Commission of the average annual operating income of the companies, computed as provided in Section 1 of the Federal Control Act;

(*g*) The fact that the companies operated a line of steamships between New York and Gulf ports, and that certain steamers named had been requisitioned by the Government before Federal control, and it was therefore doubtful whether they were taken over under the President's proclamation of December 26, 1917.

SECTION 1.—PRIVITY, ALTERATIONS, DEFINITIONS, ETC.

SECTION 2.—PROPERTY TAKEN OVER

Under this section the steamship *Proteus* was described as one of the passenger and freight steamers taken over.

SECTION 3.—ACCEPTANCE

"(*a*) The companies accept all the terms and conditions of the Federal control act and any regulation or order made by or through the President under authority of said Act * * *; and they further expressly accept the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights, at law or in equity, which they or any of them now have or hereafter can have, otherwise than under this agreement, against the United States, the President, the Director General, or any agent or agency thereof, for compensation under the Constitution and laws of the United States for the taking possession of their property, and for the use, control, and operation thereof during Federal control, and for any and all loss and damage to their business or traffic by reason of the diversion thereof or otherwise which has been or may be caused by said taking or by said possession, use, control, and operation."

SECTION 4.—OPERATION AND ACCOUNTING DURING FEDERAL CONTROL

SECTION 5.—UPKEEP

This section provides that the Director General shall expend and charge to operating expenses such sums for maintenance, repair, etc., of the property "as may be requisite in order that such property may be returned to the Companies at the end of Federal control in substantially as good repair and in substantially as complete equipment as it was on January 1, 1918."

"If, during Federal control, any of the property described in paragraph (*a*) of Section 2 hereof" (which includes the *Proteus*) "or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged by fire or marine casualty * * * he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss * * *."

"The words 'marine casualty' are used herein as applying to floating equipment and as meaning casualties covered by the usual marine insurance policy including collision clause * * *."

SECTION 6.—TAXES

SECTION 7.—COMPENSATION

This provides for the annual compensation guaranteed to the Companies under Section 1 of the Federal Control Act, namely, $47,959,898.08, and pro rata for each fractional part of a year of Federal control, subject, however, to any increase or decrease in the standard return hereafter made by the Commission," as provided in the preamble, and for payment thereof quarterly

SECTION 8.—CLAIMS FOR LOSSES ON ADDITIONS, ETC.

This section provides for additions, betterments, etc., during Federal control and for the settlement of any claims by the companies for loss accruing by reason of expenditures for such additions and betterments.

SECTION 9.—FINAL ACCOUNTING

"(*a*) At the end of Federal control all the property described in paragraph (*a*) of section 2 hereof shall be returned to the Companies, together with all repairs, renewals, additions, betterments, replacements, and road extensions thereto which have been made during Federal control, except as any part thereof may have been destroyed or retired and not replaced, in which case the provisions of section 5 hereof shall govern, * * *"

SECTION 10.—AGREEMENT NOT TO AFFECT RIGHTS INVOLVED IN CERTAIN LITIGATION

This refers to the pending suit of the United States against the Southern Pacific Company for dissolution of the control of the Southern Pacific Railway over the Central Pacific Railroad.

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SUPREME COURT OF THE UNITED STATES

STANDARD OIL COMPANY (NEW JERSEY),
Petitioner,

AGAINST

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads,
Respondents.

October Term,
1924
No. 197

BRIEF FOR RESPONDENTS

There are two questions involved in this appeal: (1) the value of a steamship sunk by collision, and (2) the effect of a settlement between the owner of the steamship and the Director General of Railroads on their rights against the other vessel.

STATEMENT

December 28, 1917, pursuant to the Act of Congress of August 26, 1916, and the proclamation of the President, the transportation system of the Southern Pacific Company, including the steamship *Proteus,* was taken into the possession and control of the Director General of Railroads.

August 19, 1918, during the period of Federal control, the *Proteus* was sunk by collision with the steamship

Cushing, owned by the Standard Oil Company (N. J.), and, with her cargo, became a total loss.

March 14, 1919, the petitioner, Standard Oil Company (N. J.), as owner of the *Cushing,* filed a petition for limitation of liability; and on July 21, 1919, the Southern Pacific Company, as owner of the *Proteus,* and Walker D. Hines, as Director General of Railroads, filed a petition for limitation of liability. These two proceedings were consolidated by order entered November 6, 1922 (Record, p. 196).

The District Court held both the *Cushing* and *Proteus* to blame and referred the question of damages to a commissioner.

There was little or no contest over the claims for personal injury or cargo damage, but the value of the *Proteus* was sharply contested. The commissioner reported her value as $750,000 (Commissioner's report, Record, pp. 180-191), and the report was confirmed by Mack, *C. J.* His opinion is at pages 192-6. A final decree was entered apportioning the damages, giving the owners of the cargo full recovery, and striking a balance in favor of the Southern Pacific Company and the Director General of Railroads of $200,448.89, "being one-half of the difference between the amount of their damages * * * interest * * * and costs, and the damages sustained by Standard Oil Company (N. J.) as owner of the *Cushing* with interest * * * and costs, including the amount paid by the Standard Oil Company (N. J.) to the cargo claimants" (Record, p. 216, fol. 898).

From the final decree both the Standard Oil Company and the Southern Pacific Company appealed, the Standard Oil Company on the merits only (Assignments of

error, Record, pp. 217-8); the Southern Pacific Company as to the value of the *Proteus* only, Record, pp. 218-9, fols. 904-6).

The Circuit Court of Appeals affirmed the decision on the merits, and fixed the value of the *Proteus* at $1,225,000, which, on the apportionment of damages, would increase the recovery of the Southern Pacific Company and the Director General of Railroads from $200,448.89 to about $500,000 (Opinion of Manton, *J.*, Record, pp. 222-230).

The petition for a writ of *certiorari* stated as reasons for allowance of the writ:

1. That the Circuit Court of Appeals based its finding on estimated cost of replacement less depreciation, which the petitioner charged was "an arbitrary formula based on two uncertain factors, to the exclusion of other material factors of controlling relevance."

2. That the measure of damages adopted by the Circuit Court of Appeals did not agree with that of other Circuit Courts of Appeal, and that it was therefore desirable that this Court should lay down a uniform and reasonable rule.

3. That the Standard Oil Company (N. J.) and the Director General were joint tort feasors who had caused the loss of the Southern Pacific Company's steamship *Proteus*, and that as the Southern Pacific Company and the Director General had made a settlement, any claim by the Southern Pacific Company against the Standard Oil Company (N. J.) was thereby extinguished, and that "in any event the Southern Pacific Company should not

be allowed to claim from the petitioner more than it has agreed with its demise charterer, the Railroad Administration, as the value of the *Proteus* and the basis for its damages for the loss of the *Proteus* through that charterer's fault" (Petition for *certiorari*, p. 6).

The allegations of subdivision 3 of the petition were *dehors* the record. Therefore, on April 28, 1924, the petitioner applied to this Court for leave to take additional evidence in this Court under an open commission. This Court denied the application for an open commission and directed that any new evidence should be pursuant to Rule 7 of the General Rules of this court.

Abstract of New Evidence

The new evidence, contained in a separate volume, proves little more than the execution of two written agreements:

(1) The agreement of February 19, 1919, which had already been introduced in evidence on the reference to assess damages (Commission, pp. 9-36; unnecessarily reprinted at pp. 68-95; see also Record, p. 107).

(2) The final settlement between the Director General and Southern Pacific Company and affiliated companies, dated December 19, 1922, under which the Director General paid the Southern Pacific Company $9,250,000 "in full satisfaction" of all claims "growing out of or connected with the possession, use, and operation of the companies' property by the United States during the period of Federal control", and the companies acknowledged that "the Director General had fully and com-

pletely complied with and satisfied all obligations on his part, or on the part of the United States, or the United States Railroad Administration, growing out of Federal control" (Commission, pp. 38-41; unnecessarily reprinted at pp. 96-9).

The agreement of February 19, 1919, establishes what was already perfectly clear, that the relations of the owner of the *Proteus* with the Government were purely contractual.

The petitioner took the depositions of four officials of the Southern Pacific Company, of the Director General of Railroads and three members of his staff. There were no cross-interrogatories.

Vandeventer, treasurer (Commission, p. 41), and Neill, secretary (p. 46), of the Southern Pacific Company knew nothing whatever of the matters as to which they were questioned. Mr. Kruttschnitt, Chairman of the Executive Committee of Southern Pacific Company, produced the contract between the Director General of Railroads and the Southern Pacific Company and affiliated companies dated February 19, 1919, which embodied the agreement between the companies and the Railroad Administration as to the taking over of the railroad system, including the *Proteus* and other vessels, the operation of the system during Federal control, its up-keep, taxes, compensation, claims and final accounting. This agreement had already been put in evidence on the reference to assess damages as Petitioner's Exhibit 1 (Record, p. 107). It was also produced on the examination of Mr. Davis, Director General of Railroads, and is unfortunately printed twice as part of the new proofs (Commission, pp. 9-36; pp. 68-95).

Mr. Kruttschnitt, when asked in the fifth interrogatory (p. 3, fol. 9) whether there were any negotiations had between the Director General of Railroads and the Southern Pacific Company in connection with a payment to the Southern Pacific Company for the loss of the *Proteus,* replied that he had no personal knowledge on which to answer the interrogatory; that up to the end of Federal control the interests of his company in connection with the loss of the *Proteus* were looked after by Mr. Spence, Director of Traffic, and Mr. Blair, General Counsel, and that after the end of Federal control the handling of claims was in charge of Mr. McDonald, Controller (p. 4) (None of these men was examined). In answer to the twenty-third interrogatory Mr. Kruttschnitt said that a lump sum settlement was made between the Director General and the companies for $9,250,000.

"I do not know what, if anything, was allowed in such lump sum settlement on account of the loss of the steamship *Proteus.* The lump sum was offered to us in settlement, and being the best offer we could obtain we accepted it. It was many million dollars less than the aggregate of the claims of the Southern Pacific Company and its subsidiaries. We do not know upon what principle our claim was scaled or eliminated" (p. 7, fol. 17).

In answer to the twenty-sixth interrogatory, as to any oral negotiations concerning the value of the *Proteus,* Mr. Kruttschnitt said:

"I know of no such negotiations, except that I am informed that a discussion took place between Mr. McDonald, Controller, and others representing the Southern Pacific, and Mr. Frank C. Wright, who represented the Director General, concerning claims of the Director General and of the Southern Pacific Company growing

out of the operation by the Director General of the steamship lines of the Southern Pacific Company. I am informed that in the course of these negotiations the value of the *Proteus* was discussed, that no final agreement was reached respecting the subject matter of the negotiations" (pp. 7-8, fol. 18).

Mr. Jungen, manager of the Southern Pacific Steamship Lines (p. 51), testified that in December, 1922, negotiations took place between Mr. Wright, representing the Director General, and Mr. Blair, the General Counsel, and members of Mr. McDonald's accounting force.

"I was also present and took part in the negotiations. The subject matter of the negotiations was all claims of either the Director General during Federal control, that is from January 1, 1918, to March 1, 1920. Among these claims was one for the value of the *Proteus*. The negotiations were oral and continued for some time. No final agreement was arrived at. I understood the object of the negotiations was to enable Mr. Wright to make a report to the Director General on this branch of the general claim of the Southern Pacific Company growing out of the operation of its transportation system by the Director General. What report, if any, was made by Mr. Wright I do not know" (p. 52, fol. 73).

Of the four witnesses from the Railroad Administration, Mr. Blaisdell, treasurer (p. 106), knew nothing of the matters as to which he was questioned.

Frank C. Wright, who was Assistant Director of Operations of the Railroad Administration in charge of marine matters (p. 56, fol. 83), testified that Mr. McDonald, controller of the Southern Pacific Company, discussed with him "their claim for the loss of the steamship *Proteus* and the lighter *Confidence*" (p. 57, fol. 85). In answer to the ninth interrogatory he said that no agreement was "reached as to the amount which should

be paid by the Railroad Administration to the Southern Pacific Company for the loss of the *Proteus*" (p. 58, fol. 86); and in answer to the fourteenth interrogatory he said that no "item representing the amount to be paid for the loss of the *Proteus* appeared in any schedule of items embodied in any general settlement between the Director General of Railroads and the Southern Pacific Company" (p. 58, fol. 87). Asked in the twenty-third interrogatory whether there was a lump sum settlement, what it was and what was allowed therein on account of the loss of the *Proteus*, he said that the lump sum was $9,250,000; "I cannot state what was allowed on account of the loss of the steamship *Proteus*" (pp. 59-60, fols. 90-1).

James C. Davis, appointed Director General of Railroads March 28, 1921 (p. 62, fol. 97), testified, in answer to the sixth interrogatory, that the final settlement with the Southern Pacific Company, which was the subject of investigation for several months prior to December 19, 1922,

"involved a claim on the part of the Southern Pacific Company, growing out of the use and operation of its property during the period of Federal control, which aggregated $54,252,694.57, and included in this claim was the claim for the loss of the steamship *Proteus*. * * * The negotiations leading to a final settlement covered a number of meetings and conferences from perhaps the 20th of November to the date of the final settlement, December 19, 1922" (pp. 62-3, fols. 97-8).

In answer to the ninth interrogatory he said that the steamship *Proteus* and the lighter *Confidence* having been sunk during Federal control, and claims having been made by the Southern Pacific Company for under-mainte-

nance of the floating equipment and property taken over by the Government, and claims having been made by the Government against the Southern Pacific Company for excess-maintenance, a conference was held about November 20, 1922, between Mr. Wright and Mr. McDonald and other representatives of the company.

"This conference was for the purpose of enabling Mr. Wright to recommend to the Director General and his Staff his view of a fair adjustment of the disputed items in the claim of the Southern Pacific Company covering the destruction of the Barge *Confidence,* the loss of the Steamship *Proteus,* and the disputed items of over and under maintenance. As a result of the conference, Mr. Wright recommended to the Director General and his Staff the following adjustment of the items above referred to:

"Allowance to the Company for undermaintenance of terminals, $20,000.00. Allowance to the Director General for excess maintenance of floating equipment, $235,000.00 This was a net allowance to the Railroad Administration of $215,000.00 excess maintenance.

"It was further recommended that the Railroad Administration allow the Company for the value of the Steamship *Proteus* and the Lighter *Confidence* a lump sum of $885,000.00. It is perhaps fair to state that the amount claimed for the loss of the Lighter *Confidence* was $16,664.00.

"As a result of these various credits, and debits, it was recommended by Mr. Wright that the Director General allow the Southern Pacific Company the sum of $670,000.00. This recommendation made by Mr. Wright was for the purpose of assisting the Director General and his staff in concluding a final adjustment of all the claims which the Southern Pacific Company was making against the Government for the use of its property during the period of Federal control" (pp. 63-4, fols. 100-1).

In answer to the fourteenth interrogatory he said that the settlement was a lump sum settlement and that he

made no itemized statement showing the amounts paid on each item in dispute. He added

"It is only fair to say, however, that in making each of these settlements the Railroad Administration kept a record, which was exclusively for the use of the Railroad Administration, and was not in anywise communicated to the carriers, showing how the lump sum settlement was finally arrived at, and in the records of the Railroad Administration there appear the items showing how this lump sum was arrived at in making the adjustment with the Southern Pacific Company.

"The Company claimed for the loss of the Steamship *Proteus* $1,268,090.26, and for the loss of the Barge *Confidence* $16,663.80, and, in arriving at the lump sum, the Railroad Administration made an allocation and apportionment on these two items of $885,000.00.

"It is perhaps only fair to state that this allocation and apportionment were made in connection with the adjustment of very many items in dispute, covering an aggregate claim in excess of $54,000,000.00, and no definite agreement as to specific items was made with the Company at the time of the final adjustment" (p. 65, fols. 103-4).

In answer to the twenty-fourth interrogatory he said that releases were exchanged between the Railroad Administration and the Southern Pacific Company (p. 67, fol. 108).

Leo J. Tracy, Controller of the Railroad Administration (p. 99, fol. 143), corroborated the testimony of Mr. Davis, the Director General, stating, in answer to the fourteenth interrogatory, that in making the settlements "the Railroad Administration kept a record, which was exclusively for the use of the Railroad Administration, and was not in anywise communicated to the carriers, showing how the lump sum settlement was finally arrived at. He says:

"The company claimed for the loss of the steamship *Proteus* $1,268,090.26 and for the loss of the barge *Con-*

fidence $16,663.80 and, in arriving at the lump sum, the Railroad Administration made an allocation and apportionment on these two items of $885,000.

"It is perhaps only fair to state that this allocation and apportionment was made in connection with the adjustment of very many items in dispute, covering an aggregate claim in excess of $54,000,000. and no definite agreement as to specific items was made with the company at the time of the final adjustment" (p. 103, fols. 150-1).

Procedure

At the outset, an orderly statement of the procedure followed is desirable:

1. The first admiralty proceeding in this litigation was a libel *in rem* filed by the Southern Pacific Company, owner of the *Proteus,* against the steamship *Cushing* September 11, 1918 (Record, fol. 9). This is not printed in the record, but is mentioned in the sixth article of the petition of the Standard Oil Company for limitation of liability (Record, p. 4, fol. 9). The damages claimed in this libel, $1,850,000, included not only the value of the *Proteus* but also personal effects of officers and crew and cargo of which the Southern Pacific Company was bailee.

2. March 14, 1919, the Standard Oil Company as owner of the *Cushing* filed a petition for limitation of liability.

3. July 21, 1919, the Southern Pacific Company, as owner of the *Proteus,* and Walker D. Hines, as Director General of Railroads, together filed their petition for limitation of liability (Record, fol. 33).

As the Director General was operating the *Proteus* under requisition, manning, victualling, and navigating the vessel, he was entitled to limit his liabilty to the same extent as a private charterer. *The Virginia,* 264 Fed. 986. It may have been unnecessary for the Southern Pacific Company to join in the petition, but as it had been sued in the New York Supreme Court and in the United States District Court by persons claiming damages for personal injuries (Record, p. 12, fol. 39) and as many claims had been presented to it (Record, p. 14, fol. 45), it was prudent and convenient for the Southern Pacific Company to join in the petition. Moreover, as appears from the record, the *Proteus* was insured against marine perils and the interests of the underwriters would be best protected by making the original assured, the Southern Pacific Company, a party to the proceeding (Record, fols. 792, 794, 795, 796 and 798).

4. The final decree of the District Court, entered November 28, 1922, adjudged that the "Southern Pacific Company and James C. Davis, as Director General of Railroads, as Agent, recover from the petitioner, Standard Oil Company (New Jersey), with interest until paid, the sum of $200,448.89." Settlement between the Director General and the Southern Pacific Company was not made until about a month later, December 19, 1922 (Final Settlement, Commission, pp. 38-41).

5. December 27, 1922, the Standard Oil Company appealed from the final decree (Notice of Appeal, Record, p. 217, fol. 899).

6. January 18, 1923, the Standard Oil Company filed its assignments of error, which disclosed the fact that

it appealed only on the merits and not on the question of damages (Assignments of Error, Record, pp. 217-8, fols. 901-3).

7. January 27, 1923, the Southern Pacific Company, as claimant, appealed from the final decree on the value of the *Proteus* only (Record, p. 218, fol. 904).

Thus both the merits and the damages were brought before the Circuit Court of Appeals. It was unnecessary for the Director General to join in the appeal. He had settled with the Southern Pacific Company and no doubt had been paid by the underwriters. The appeal was for the benefit of the underwriters, who might have intervened as co-claimants but were satisfied to allow the litigation to proceed in the name of the Southern Pacific Company.

Counsel for the petitioner in their brief criticize us for representing on the reference both the Government and the Southern Pacific Company, suggesting that because of a conflict of interest they should have been represented by separate counsel. That would, however, seem to be a matter for the Director General and the Southern Pacific Company to determine for themselves. It was purely a matter *inter sese.*

POINTS

I. THE SETTLEMENT MADE BETWEEN THE DIRECTOR GENERAL OF RAILROADS AND THE SOUTHERN PACIFIC COMPANY HAD NO EFFECT UPON THE RESPONDENTS' RIGHTS.

1. The substance of the petitioner's argument with respect to the additional testimony taken by commission is that in consequence of its settlement with the Railroad Administration the Southern Pacific is precluded from recovering on the decree. Inasmuch, however, as an appeal in admiralty is a trial *de novo,* the petitioner has sought to rearrange the parties in accordance with its own purposes, with a view to determining what allowance should be made to the Director General of Railroads as the real party in interest. In other words, the petitioner does not claim that the release by the Southern Pacific Company to the Director General releases it altogether. The contention is that it releases it only so far as the Southern Pacific Company is concerned. It is not claimed that its liability to the Director General is released, but, because its liability to the Southern Pacific Company is released, the sum of its liability to the Director General should be readjusted.

The petitioner devotes much space to a demonstration of the supposed necessity of a re-alignment of the parties in view of the settlement between the Director General and the Southern Pacific Company. The foundation of this pretentious discourse is the fallacious assumption that the Southern Pacific Company could have sued the Director General, either alone or together with the Standard Oil Company, in tort for the collision. No authority

is vouchsafed for this proposition, which, while of minor importance, may be answered briefly.

The Director General was not a tort feasor with respect to the Southern Pacific Company, first, because the relations between them were governed by contract, and, secondly, because if the Director General could be said to have committed a wrong against the Southern Pacific Company, it was not a legal wrong since he was immune from suit.

This Court said in *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456:

"In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain,' *North Carolina R. R. Co.* v. *Lee*, 260 U. S. 16; *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554; *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135; *In re Tidewater Coal Exchange*, 280 Fed. 648, 649; and it may not be held to have waived any sovereign right or privilege unless plainly so provided." p462

The sovereign immunity from suit was waived only to the extent specified in Section 10 of the Federal Control Act:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. * * * But no process, mesne or final, shall be levied against any property under such Federal control."

Construing this provision this Court said in *Missouri Pacific Railroad Co.* v. *Ault*, 256 U. S. 554:

"The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such rights or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917; to cases where the cause of action arose before that date and the suit against the company was filed after it; and to cases where both cause of action and suit had arisen or might arise during federal operation. The Government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control."

The substance of the privilege conferred by Section 10 was, therefore, that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers". Only as a common carrier could the Director General be sued in tort. It must be apparent that the Director General was not a common carrier with respect to its possession and control of the *Proteus*, and that the Southern Pacific Company could not sue him in tort for her loss by collision. Such an action would not be "the

enforcement of liabilities ordinarily incident to the operation of carriers".

Since the Director General could not be sued, he cannot be said to have committed a tort. As this Court said in *The Western Maid*, 257 U. S. 419, 433:

"The United States has not consented to be sued for torts, and, therefore, it cannot be said, in a legal sense, that the United States has been guilty of a tort, for a tort is a tort in the legal sense only when the law has made it so."

The sole remedy of the Southern Pacific Company was under its contract of February 19, 1919, made pursuant to the provisions of the Act of March 21, 1918, and the President's proclamation of March 29, 1918.

2. The petitioner next contends that as the Director General did not appeal from the decree of the District Court, he cannot be allowed a higher value for the *Proteus* than that fixed by the District Court, or, at all events, no higher value than the amount he paid to the Southern Pacific Company in settlement of his contract obligation.

It must be observed that this point was not suggested in the Circuit Court of Appeals, where the valuation of the *Proteus* was increased. It is well settled, as the petitioner admits, that an appeal in admiralty is a trial *de novo*. *Irvine* vs. *Hesper*, 122 U. S. 256; *Reid* vs. *Fargo*, 241 U. S. 544; *Watts, Watts & Co.* vs. *Unione Austriaca, etc.*, 248 U. S. 9; *The John Twohy*, 255 U. S. 77. Accordingly, in *Irvine* vs. *Hesper, supra*, where on an appeal by salvors alone from a decree of the Circuit Court reducing the award made by the District Court, this Court said:

"We do not think that the fact that the claimants did not appeal from the District Court alters the rule. When

the libellants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants." p 267

In *Munson Steamship Line* vs. *Miramar Steamship Company*, 167 Fed. 960, which was approved by this court in *Reid* vs. *Fargo, supra*, the Circuit Court of Appeals for the Second Circuit increased an award of the District Court although the libellant had not appealed, rejecting the contention that one who had not appealed could be heard only in support of the decree and could not have more or other relief than it gave.

"The libellants were justified in regarding the appeal taken by the claimants as securing to libellants the right to be heard in the Appellate Court without the necessity of perfecting a cross-appeal in order to preserve that right." *The John Twohy, supra.*

It is, therefore, idle to contend that the Director General of Railroads was finally bound by the valuation fixed by the District Court because he did not join in the appeal.

Nor is there greater force in the petitioner's suggestion that the Director General must be limited to a valuation equivalent to the amount paid to the Southern Pacific Company in settlement of his contract obligation. This contention is involved with the petitioner's confused ideas concerning the common law doctrine of joint tort feasors, which are examined later. But it may be observed here that although the petitioner repeatedly refers to the amount of this payment the sum is not mentioned. No amount was in fact agreed upon. The aggregate claim of the Southern Pacific Company was $54,252,694.57. The

lump sum settlement which it perforce accepted (Commission, p. 7) was $9,250,000 (Commission, p. 64). There was no agreement as to specific items in the final adjustment. The Railroad Administration kept its own record showing how the lump sum was finally reached, but this was not communicated to the Southern Pacific Company (Commission, p. 65). The Director General says that Mr. Wright recommended to him to allow the company for the *Proteus* and the lighter *Confidence* $885,000, of which $16,664 was for the lighter, but that making an allowance to the company for under maintenance of terminals, $20,000, and charging it with $235,000 for excess maintenance of floating equipment reduced the allowance to $670,000 (Commission, p. 64).

The petitioner's reference to the case of *The Jersey City*, 51 Fed. 527, as authority for its view (Brief, pp. 53, 54) is singularly inept. There, the owner of a tug whose tow had been damaged by collision with a ferryboat, paid under protest the demand of the owner of the tow, taking in return a release from all liability which in terms subrogated him to right of the owner of the tow. The tug owner then libelled the ferryboat, alleging these facts and basing his claim on subrogation. The petitioner stresses the fact that the tug owner recovered "the amount which it had paid to the owner of its tow in settlement of the damages received by the latter". The reason was that this was the only amount for which he sued. But the Circuit Court of Appeals added that as bailee he was entitled, without reference to subrogation, to recover full damages:

"If, say the court in *White* vs. *Webb*, 'the suit is brought by a bailee or special property man against the

general owner, then the plaintiff can recover the value of his special property; but if the writ is against a stranger, then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest, in trust for the general owner. The libellant could have recovered the damages occasioned by the tort of the ferryboat, without paying the owner of the tow. A subsequent payment, whether *ex gratia* or under compusion, could not prejudice the right of recovery."

3. The settlement made by the Southern Pacific Company with the Railroad Administration had no legal effect upon the decree below.

The Director General was the special owner in sole possession and control of the *Proteus,* and the Southern Pacific Company was the owner of the reversion. Together they constituted a single owner and together they held the full interest in the claim of the *Proteus* against the *Cushing.* This common claim was reduced to a decree against the *Cushing* in favor of both the Director General and the Southern Pacific Company.

It is, of course, obvious that upon the satisfaction of such a common decree there would have to be an adjustment of the equities between the parties as their interests might appear. No reason is apparent why these equities should not be settled during the litigation as well as after its close. As against a third party the common right and common decree should persist.

There was no tort by the Director General toward the Southern Pacific Company upon which a release could operate. The rights and duties of the Southern Pacific Company and the Railroad Administration were fixed by the contract of February 19, 1919. By its terms the *Proteus* was required to be either

restored or paid for. Since she was not restored she was paid for in accordance with the agreement. The Southern Pacific Company as owner was not concerned in the least with the circumstances which made it impossible for the Director General to restore her. Nor was its right to reimbursement affected by any considerations of liability for her loss. If lost without negligence, the Railroad Administration, although not liable as bailee, was liable under its contract. *Clarke* v. *United States,* 95 U. S. 539, 542. The obligations of the Director General to the Southern Pacific Company on the one hand, and to the *Cushing* on the other, were separate and distinct, resting in the former case on contract, in the latter in tort.

The principle which the petitioner has lost sight of is illustrated by a line of cases of which *Ridgeway* vs. *Sayre Electric Co.,* 258 Pa. St. 400, may be cited as an example. There an employee of an electric company was killed by coming in contact with the wires of his company while repairing those of a telephone company using the same poles. He had been under an insurance plan with his employer, and his wife, upon receiving payment of the amount of the insurance, gave his employer a release, which the telephone company set up in defense to a suit against it. In refusing to apply it to that effect the Court said:

"The payment of the policy in such a case is not in settlement of the claim for damages or as the value of the injury, but is on the basis of a contract and in consideration of the receipt of the premiums. The payment here was the exact amount of the insurance fund as stated above and was made without reference to, or in anywise concerning, an alleged tort; nor is there evidence tending

to show the parties dealt otherwise than on a contractual basis, without reference to questions of negligence or responsibility for the action. It cannot be said, therefore, that the plaintiff has obtained satisfaction of her claim for damages from one tort feasor and hence the release of the other does not exist."

In admiralty, where both vessels are found in fault for collision, the resulting division of damages extends of course to what one of the parties pays to the owner of cargo on board the other, with respect to which, however, the contract relations of the vessel and her cargo have nothing to do. *Erie R. R. Co.* vs. *Erie & Western Transportation Co.*, 204 U. S. 220, 226; *The Chattahoochee*, 173 U. S. 540. Nor does a seaman's contract with the owners of his vessel affect his representative's claim against the other vessel where both vessels were in fault for his death. *The Hamilton*, 207 U. S. 398.

The satisfaction by the Railroad Administration of its contractual obligation to the Southern Pacific Company had no more effect upon the tort obligations of the Standard Oil Company than would have been the case if the Railroad Administration had paid the purchase price of the *Proteus*, or had collected from underwriters. *The Atlas*, 93 U. S. 302, 310.

4. The two vessels in collision were not, however, joint tort feasors within the common law rule. The precise point was decided by the English Court of Appeal last year in the case of *The Koursk* [1924], P. 140; 40 T. L. R. 399. It is a curious fact, as one of the judges remarked, that although abundant dicta could be found, the question, what constitutes a joint tort feasor within the meaning of the rule, had never been closely considered in any reported English case. After a careful consideration

of the question the Court of Appeal came to the conclusion, as the court below had, that the test whether damage which flows from the negligent navigation of two ships constitutes a joint tort, is whether the wrongdoing ships were participating in one act of negligence or whether they were by separate acts of negligence combining to produce the same damage. Or, conversely, parties are not jointly liable for a tort where each is responsible for a different *injuria*, and the two *injuriæ* happen to produce the same *damnum*. Lord Justice Scrutton said:

"The substantial question in the present case is what is meant by 'joint tortfeasors'? And one way of answering it is: 'Is the cause of action against them the same?' Certain classes of persons seem clearly to be 'joint tortfeasors': the agent who commits a tort within the scope of his employment for his principal and the principal; the servant who commits a tort in the course of his employment and his master; two persons who agree in common action, in the course of which, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with, another. * * * But the same damage does not mean the same tort, and therefore does not mean the same cause of action. * * * To make the tort you want a wrongful act causing damage; and to make the tort the same cause of action both elements must be the same. Thus in *Brunsden* v. *Humphrey* (14 Q. B. D. 141), where the negligence was the same, but one damage was to the person and one to the property, a judgment for one cause of action, wrongful injury to property, was no bar to a second cause of action, trespass to the person. If this is so where the same negligence causes different kinds of damage, still more is it so where different and independent wrongful acts cause the same damage; there are two causes of action, and a judgment on one does not bar the other.

The judgment below in effect takes the same view as to the meaning of 'joint tortfeasors'. In the present case the *Koursk* was guilty of negligence in proceeding out of

course across the line of its convoy; the *Clan Chisholm* was guilty of quite independent negligence in not reversing when the action of the *Koursk* was observed. These two separate and independent negligences resulted in a collision, the direct consequence of which was a collision with the *Itria*. In my view the *Koursk* and the *Clan Chisholm* were not joint tortfeasors of the same tort, but separate tortfeasors of two different torts, and therefore at common law judgment against one in respect of the cause of action against it would not be an answer to a claim against the other in respect of the different cause of action on which it was sued."

"The *damnum* no doubt is only one", said Lord Justice Bankes, "and the act of negligence of each contributed to that *damnum*, but the acts of negligence are still, in my opinion, separate. There is no possible connection between them. They began, and they continued, and they ended, as separate acts, and they never became a joint act."

The sole difference between English law and our own in this respect is that our courts do not recognize the bar of a judgment without satisfaction. The most eminent judges here, as in England, have often used the term joint tort feasors as a short form of expression for defendants whose concurrent acts of negligence have caused an injury, where the judgment would have been the same if the word joint had been omitted. In the cases of concurrent negligence cited on page 45 of the petitioner's brief the defendants were sued together, and each was undoubtedly liable for the whole damage. The negligence of each tort feasor was a proximate cause of the injury, and it was impossible at common law to ascertain the degree in which each contributed to the result. But the fact that each tort feasor is liable for the entire damage does not warrant the conclusion that the tort is joint.

Co-defendants are not necessarily joint defendants. As Lord Justice Scrutton said in *The Koursk, supra:*

"This seems directed rather to the remedy for the tort than to the nature of the tort itself, and to say that a joint tort is one for which persons are jointly liable only leads to the inqury: For what torts are persons jointly liable?"

In the case at bar separate and different faults on the part of the two vessels brought about the collision. The *Cushing* was held in fault for not flashing on her lights and for failing to give the *Proteus* a wider berth; the *Proteus* for not signaling her extreme helm movement and for continuing at full speed. Each was liable, but they were not joint tort feasors.

also The Hudson (A. Brown J.) 15 Fed. 162-1

5. The truth is that the common law doctrine of joint tort feasors is wholly inapplicable to this situation. The reason why two tort feasors are each liable at common law for the entire damage caused by both, is that it is impossible in that forum to apportion the loss in accordance with their respective faults. But in admiralty there is no difficulty of this sort. Where both are in fault, the damages are apportioned one-half to each.

In this case, as the petitioner says (Brief, p. 50), the pleadings were "locked together, in effect, just as if they consisted of a libel and cross-libel". Before the settlement between the Railroad Administration and the Southern Pacific Company both vessels had been adjudged in fault and entitled to limit liability. Each vessel was condemned to pay one-half the damages arising from the collision. Inasmuch, however, as the *Proteus* was lost, the decree ran against the *Cushing*, the *Proteus* recovering only one-half her damage in con-

sequence of her fault. In this situation the relation of the parties was wholly unlike the status of joint tort feasors at common law. Since each was liable for one-half the damages, certainly neither was liable for the whole. Therefore, under common law analogies, the release of one would not release the other.

The inapplicability of the common law doctrine may be put in another way. A fundamental incident of the common law doctrine is the denial of contribution between the wrongdoers. The admiralty rule is well known, however, to be the other way. *Erie Railroad Co.* vs. *Erie Transportation Co.*, 204 U. S. 220, 225. *The North Star*, 106 U. S. 17; *The Sterling and The Equator*, 106 U. S. 647. The right to contribution belongs to the substantive law of admiralty and is not a mere incident of a form of procedure. *The Ira M. Hedges*, 218 U. S. 264. If, then, one of two vessels at fault may enforce contribution from the other, it cannot be said that each is liable for the entire damage as at common law. Even where one is sued alone, he is only primarily liable, since the other may be compelled to contribute. Undoubtedly, where an innocent third party claims against two vessels in fault, he is not limited to recourse to each for one half of the damage. If he cannot collect from each his due share, he may have his remedy over against the other for it. *The Alabama* and *The Gamecock*, 92 U. S. 695. But there is no such recourse in the case of cross-libels between two vessels in collision. *The Atlas*, 93 U. S. 302. When the fault of both is determined, the damages are apportioned one half to each. The liability is then in no sense joint, since each is liable only for a fixed portion.

II. THE CIRCUIT COURT OF APPEALS CORRECTLY STATED AND APPLIED THE RULE OF DAMAGES.

In his opinion Manton, *C. J.*, stated the rule thus:

"The principle governing the computation of damages is that the sufferer by the collision which is the result of wrongdoing, whether by negligence or mistake, is entitled to *restitutio in integrum*. It is that, as far as practicable, the owner is to be restored to the same pecuniary position as if no collision had taken place * * *" (Opinion, Record, pp. 227-8).

The application of this basic principle is supported by abundant authority. *The Baltimore* (8 Wall. 377); *Alaska S. S. Co.* v. *Inland Navigation Co.* (211 Fed. 842); *The I. C. White* (295 Fed. 593); *The Clyde* (Swabey 23); *The Clarence*, 1850 (3 W. Rob., 283, 285); Marsden's Collisions at Sea (7th Edition, 1919), p. 117; Roscoe on Damages (2nd edition, 1920), p. 5; Spencer on Maritime Collisions, § 200. It has been adopted by this Court as the rule of damages in eminent domain cases. *Campbell* v. *U. S.* (unreported), decided Dec. 8, 1924; *Seaboard Air Line Railway Co.* v. *U. S.* (261 U. S. 299).

The object of the rule is to place the owner of the vessel as nearly as may be in the same pecuniary position in which he would have been but for the collision, that is, the owner is entitled to recover the actual value of the lost vessel. The best evidence of such value is the opinion of competent persons who knew the vessel shortly before she was lost, and the next best evidence is the opinion of persons conversant with shipping and the transfer of vessels. If there is a market, these opinions are based upon current market prices. *The Baltimore* (*supra*); *The Colorado* (Fed. Cas. 3029); *Alaska S. S. Co.* v. *Inland*

Navigation Co. (*supra*); *The Mobila* (147 Fed. 882). Where no market exists, the basis of calculation is necessarily different. In some cases, where the vessel has been recently built, evidence of original cost with proper deduction for deterioration from the time of construction is given great weight. *Leonard* v. *Whitwill* (19 Fed. 54); *The City of Alexandria* (40 Fed. 697); *The Samson* (217 Fed. 344). Spencer on Maritime Collisions, § 200. Where the vessel has not been recently built or where for some other reason it would be inequitable to base the calculation on original cost, evidence of cost of reproduction less depreciation has been admitted and given important consideration. *The I. C. White* (*supra*); *In re Arbitration between the Mersey Docks and Harbor Board and the Lords Commissioners of the Admiralty,* 3 K. B. Div. [1920] p. 223.

Judicial discussion of these different kinds of evidence has led the Courts to state three rules of damages—market value, cost of production less depreciation, and cost of reproduction less depreciation—as the most trustworthy methods of measuring actual value, under the general principle of *restitutio in integrum.* The adoption of any one of these rules or methods does not involve the exclusion of all or any other relevant facts. Indeed, the question of value could not be determined without other evidence, such as the age of the vessel, her condition at the time of the collision, her size, tonnage, etc.

The petitioner's principal attack is directed against the statement of Manton, *C. J.,* that the special circumstances of the case "invoke the rule of damages of cost of (re)production less depreciation" (Record, p. 229).

The force of this attack is much weakened by the fact that all the petitioner's own expert witnesses based their valuations of the *Proteus* on cost of reproduction less depreciation. The method used by all the experts on both sides was the same. The only reason why the results differed was that one side assumed a lower cost of reproduction and a higher rate of depreciation than the other. Which set was correct was a pure question of fact. As the experts on both sides used only this method, it is not surprising that the learned Circuit Judge featured it in his opinion.

The finding of the Circuit Court of Appeals was not based on any one formula or theory, but on a consideration of all relevant facts and its conclusion that the weight of evidence was in favor of the higher valuation. This is evident from the closing sentences of their opinion:

"We think the greater weight of persuasive testimony favors the proof offered on behalf of the *Proteus* as to value, and that the rate of depreciation was fair and reasonable under all the circumstances * * *. We are convinced that the valuation fixed by the court below was inadequate, and that convincing testimony requires our accepting the value claimed by the owners of the *Proteus*" (Record, p. 230).

It is obvious that when read as a whole the opinion does not rest on a formula dogmatically stated and rigidly applied, but on all the evidence before the Court, which included all relevant facts. These facts Judge Manton considered and gave full weight to, for immediately after the statement criticised he referred to the age of the *Proteus*, her size and carrying capacity; her original cost, the fact that she was under requisition, the fact that she was reboilered in 1909, the fact

that she was unusually well kept up, and the fact that in 1917 "a joint Army and Navy Board and a Board of Appraisal of Merchant Private Vessels fixed the value of the *S. S. Saratoga* and the *S. S. Havana* at two and a half times what they cost in 1916" (Record, pp. 229-230, fols. 929-930).

III. The Circuit Court of Appeals rightly increased the value of the Proteus to $1,225,000.

The value of the *Proteus* at the date of her sinking is merely a question of fact. The Commissioner appointed by the District Court considered the three experts on each side as "equally frank and honest in giving their views", referred to the fact that the two groups were over $600,000 apart, and then concluded that "the views of the petitioner's witnesses seem to me more nearly in accord with the probabilities in the case at bar than those of claimant's witnesses" (Record, p. 190, fol. 847). He did not feel "called upon to find an exact replacement value or a particular method of depreciation that would disclose the exact amount that should be deducted for wear and tear during the period of 18 years." Quoting Judge Addison Brown in *The Utopia*, 16 Fed. 507, where he said:

> "I do not consider it imperative to adopt the judgment of any one of the witnesses, or any two or more, but, weighing the whole testimony, in all its parts, I feel justified in reaching a conclusion which a jury would entertain after hearing all the facts and circumstances.",

the Commissioner fixed the value of the *Proteus* at $750,000 (Record, pp. 190-1, fols. 848-9).

In the District Court, Mack, *C. J.*, after stating that "the market for all such ships was for all substantial purposes closed during the war", and that "ships which happened to be free from requisition * * * were able to make huge monopoly profits from a single voyage", and that "so called market value of ships soared even out of proportion to the cost of construction of new ships, although this too had also increased abnormally" (Record, fols. 854-5), continued:

"If evidence is adduced, indicating that the market price is not fair under the circumstances, then all other relevant facts should likewise be considered in determining fair value" (fol. 856).

"The cost of reproduction less depreciation has been commonly adopted as a standard for rate making purposes. * * * But there are difficulties of theory and practice in the application of the standard. * * * Recently there has been a tendency among legal and economic writers to bring to the fore the prudent investment standard" (fols. 856-7).

He thought that it would be "proper in finding the fair value of the *Proteus* in August, 1918, to discount the then cost of reproduction" (fol. 858), and was inclined to reduce the value of the *Proteus,* but in view of the proof of the upkeep of the vessel, he concluded to confirm the report (fol. 862).

In the Circuit Court of Appeals Manton, *J.,* after stating the general principles of law governing in cases of total loss, commented on the evidence of cost of reproduction as follows:

"Evidence was offered on the trial in fixing the value in August, 1919, the date of the loss, of the cost of reproduction, less depreciation. The court below discounted

the cost of reproduction for the reason that it regarded the high prices of 1918 as artificial and fictitious, but the high prices represent actual values. The withdrawal by the belligerents of a large part of their merchant tonnage for commercial pursuits, for war and other public uses, the chartering of neutral ships to them for like purposes, and the heavy toll of merchant ships destroyed by the submarines and other hostile attacks, and commandeering the shipyards for the construction of ships for Government purposes, all caused not only a severe shortage of tonnage available for commercial uses, but disrupted the channels of the trade and caused high prices. It resulted in high freight rates and increased tonnage values. This condition was brought about by the war, and to be sure was not expected to survive indefinitely after the war, but there was nothing artificial or fictitious about these prices. They were brought about by unusual economic conditions. The period of high prices lasted for several years during the war period. Evidence was offered by the claimant that in 1917, a Joint Army and Navy Board, and a Board of Appraisal of Merchant Private Vessels, fixed the value of the S. S. *Saratoga* and the S. S. *Havana* at two and a half times what they cost in 1916. And in arriving at that conclusion, they estimated the cost of reproduction less depreciation" (Record, p. 229).

He then referred to other evidence in the case and found the following relevant facts:

"The *Proteus* was a steel passenger and freight steamship, equipped with triple expansion engines and Scotch boilers. Her speed was 15 knots, dimensions, 405 feet long, 48 feet beam, 32 feet 9 inches in depth. Her tonnage was 3,006 tons net; 4,836 tons gross and about 4,000 tons dead weight. She was built in 1900 by the Newport News Shipbuilding Company for use in the Southern Pacific Railroad Company's service between New York and New Orleans, and was so used until taken over by the Government. Her original cost was $557,600. In 1909 she was reboilered and otherwise improved at a cost of $90,000. She was unusually well kept as the court below found" (Record, p. 230).

Referring to the expert witnesses he said:

"Three experts, one a surveyor and appraiser of thirty-five years' experience, and the other two the presidents of two of the largest steamship companies in the United States, gave values for the vessel for August, 1918, which, justified the claim of $1,225,000. This made due allowance of two and a half per cent per year for depreciation. There is no fixed rule as to the amount of depreciation to be deducted, but two and a half per cent is reasonable in application for a period when there was such demand for vessels. Obviously, it might be unreasonable in other periods" (Record, p. 230).

* * * * * * *

"Opposed to this testimony is that of an employee of the owner of the *Cushing*, connected with the construction department. Another, who was a member of the Board that appraised the *Havana* and *Saratoga* at two and a half times its value at the time of construction. The third expert who seems to have had nothing to do with the valuation of merchant ships but who was engaged in the construction of yachts and torpedo boats" (Record, p. 230).

As "the greater weight of persuasive testimony" favored the proof of value offered in behalf of the respondents, the Circuit Court of Appeals concluded by finding the value of the *Proteus* to be $1,225,000.

1. Summary of evidence of value.

Respondents' Proofs.

The experts examined for the *Proteus* were Frank S. Martin, Alfred Gilbert Smith and H. H. Raymond.

Mr. Martin, a marine surveyor and appraiser of 35 years' experience, in 1918 alone appraised some 150 to 200 vessels as a member of the Ocean Advisory Board on Just Compensation (Record, p. 27, fol. 529). He had

known the *Proteus* since she was built and had seen her a few months before her loss (Record, p. 28, fol. 530). He valued her in August, 1918, at $1,225,000.

"Q. Mr. Martin, how do you get at this value of $1,225,000? What does it represent? A. There being no sales to guide me, I took the estimated cost of the reproducing a vessel of the same size and description as the *Proteus* in August, 1918; and the estimated cost was $1,750,000. From that cost I deducted two and one half per cent for eighteen years depreciation, which is $525,000, leaving a value of $1,225,000." (Record, p. 31, fol. 537).

Mr. Martin's opinion was based also on actual sales which occurred after the Armistice and he said the high values continued up to the beginning of 1920.

"Q. Mr. Martin, how long after the armistice did the high values continue and the high cost of construction? A. Up to about the first of this year. Since freight rates have fallen values have fallen.

"Q. And looking over the whole period tell us where the peak was? A. The peak of the values was just about shortly—just about the time of the ending of the war.

"Q. And am I to understand that after the armistice and for a year and a half after boats were sold for these high prices? A. They were, and up to the beginning of this year.

"Q. And the cost of construction kept very high you say? A. It did" (Record, pp. 32-3, fol. 540).

"Q. Is your valuation based on theory or is it based on experience in actual sales after the armistice? A. It is based on sales—based mostly on sales since the armistice, and also before the war, even before we went into the war vessels were selling for $300 a ton" (Record, p. 33, fol. 541).

* * * * * * *

"Q. And after the armistice the embargo so to speak was lifted? A. Yes.

"Q. And then they began to be sold again? A. Yes, that is correct.

"Q. At these very high prices? A. Yes, that is correct.

"Q. And it is on the consideration of those facts that you have fixed this sum of $1,225,000, as your best judgment of what the boat was worth and could have been sold for if it could have been sold on August 19, 1918, is that it? A. That is absolutely correct" (Record, pp. 33-4, fol. 541).

Mr. Raymond, President of the Clyde and Mallory Lines and of the American Steamship Association, who has been in the steamship business over thirty years, valued the *Proteus* at the time of her loss at $1,297,637. He took the replacement value, $1,750,000, allowed for depreciation and gave credit for "a little better than the ordinary depreciation because they kept their ships up better" (Record, pp. 57-63, fols. 586-597).

Mr. Smith, President of the New York and Cuba Mail Steamship Company, which operates 110 vessels, valued the *Proteus* at $1,350,000. Mr. Smith testified in part as follows:

"Q. And you know, I suppose, and keep yourself advised as to values of vessels and sales of vessels, do you not? A. Principally on costs of construction.

"Q. Many of your ships have been built under your direction have they not? A. Under my personal direction, yes, sir" (Record, p. 36, fol. 546).

* * * * * * *

"A. In arriving at a fair market value for the *Proteus* I proceeded on two separate different lines. In the early part of 1917 we had the steamship *Havana* and her sister ship the steamship *Saratoga* taken over by the Government. The Navy Department took the vessels and at that time the question of what compensation we would receive for the vessels came up. A board had been appointed by the Navy Department consisting of naval officers, naval constructors and engineers, as well as some commercial men—one prominent ship owner, and the Presi-

dent of the American Bureau of Shipping qualified as an engineer and builder.

"Q. That was Stevenson Taylor? A. Yes, Stevenson Taylor, and those gentlemen after listening to my testimony, etc., appraised the vessel and paid us $2,240,000 for each one of those vessels, one built in 1906 and the other built a few months after.

"Q. What tonnage. A. 6400.

"Q. Gross? A. Registered gross tonnage, approximately 5000 tons deadweight, passenger carrying capacity about 300.

"Q. Would that be divided into tons, any kind of tons, the value as so much per ton, Mr. Smith? A. In dealing with passenger boats we always give the gross registered tonnage. As I said before in dealing with freight vessels we always are accustomed to deal with what the vessels will carry in weight.

"Q. That value would be over $350 a ton? A. Yes, I think it figures about $350.

"Q. Gross tons? A. Yes.

"Q. Have you had other experiences that would lead you toward ascertaining the value of the *Proteus?* A. At that time, seeking to get at a price for the ships that were taken right out of our service, we asked the builders what they would duplicate the *Havana* and the *Saratoga* for.

"Q. Those were the Cramps? A. The Cramps. They had the plans and specifications, they knew what the vessels had cost to build and they were the logical people to give us a fair estimate, and their estimate was a little over $3,000,000 for each vessel.

"Q. That would be $500 a gross ton practically? A. I think exactly, in getting at this value, and as I said before I proceeded along two different lines. I said if the *Havana* had originally cost us $900,000——

"Q. (Interrupting.) That is what it cost you in 1906? A. Yes,—in 1906, and it was worth according to the Board of Appraisal, after considerable testimony had been given $2,240,000, then the *Proteus* which I calculated had cost in the vicinity of $600,000 originally, must be worth $1,500,000, less an allowance for the difference in the ages.

"Q. It was six years older? A. Yes, six years older, and I made an allowance of $150,000 and I arrived at a figure of $1,350,000 as the fair market value of that ship.

"Q. Did you approach the problem from any other angle? A. I approached it from another angle, and that was by taking the value of the *Proteus* to be say two-thirds of the value of the *Havana,* considering the vessel's tonnage, passenger capacity, speed, equipment and all that as being two-thirds of the *Havana*——

"The Commissioner: You think it was in fact about two-thirds?

"The Witness: To the best of my recollection; these are all approximate figures of course, Mr. Commissioner, I said if it will cost $3,000,000 to build the *Havana* it will cost $2,000,000 to build the *Proteus,* then allowing a depreciation for her age of six hundred and odd thousand dollars, brought it very close to the figures that I had obtained by the first process of $1,350,000, and it is on that that I gave the fair value of the ship at $1,350,000" (Record pp. 38-40, fols. 550-3).

Mr. Smith's method is different from that of other witnesses, although he arrives at substantially the same result. He considered the cost of reproduction and was able to check up his estimate by the amounts actually paid his company by the Government for two of his own steamers, the *Havana* and *Saratoga.* For the *Havana,* which was built in 1906, at a cost of $900,000, the Government paid $2,240,000 (Record, pp. 38-40, fols. 550-553).

Petitioner's Proofs

Petitioner's witness, Mr. Morrell, who had been employed in the Construction Department of the Standard Oil Company since 1914, knew nothing of values of vessels other than tankers. He admitted that he was not familiar in detail with the cost of construction of freight and passenger vessels.

"Q. And do you try to keep familiar with the sales of other vessels outside, not tankers? A. In a general way, but not in detail.

"Q. You are not at all interested in those freight and passenger boats, are you? A. Only in a general way.

"Q. You are not at all interested in the cost of constructing freight and passenger vessels, are you? You have not been since you have been with the Standard Oil Company during the last six years? A. Not in any detail" (Record, p. 76, fol. 621).

In arriving at a valuation of $630,000 Mr. Morrell started with $1,670,000 as the cost of reproduction, and then used a depreciation rate of 4% for 14 years, and 2½% for 4 years. He had little knowledge on the subject of depreciation and the high rate used by him was without foundation.

"Q. Have you a familiarity with the methods adopted by steamship companies in this country as to writing off the value of ships? A. Yes, sir.

"Q. What companies do you know of besides the Standard Oil Company? A. Why, the Shipping Board. I know the method they have used.

"Q. We all know that, but it is not a model, is it? A. I am not here to criticise the Shipping Board.

"Q What steamship company do you know, or are you familiar with or have enough familiarity with to say what it marks off each year on its books to represent the depreciation in value of a ship? What particular company do you know? A. I cannot name any company in which I am specifically informed as to their bookkeeping methods, but I do know the general method by which the depreciation is written off in a general way.

"Q. I am not asking you about anything in general, I am asking you something specific. Do you or do you not know any steamship company in this country well enough to say what it writes off each year to represent the depreciation in value of its ships? A. Not as to individual companies, no.

"Q. And what is this general knowledge that you assume? What is this general principle that you assume, what is it based on, what is it? A. Part of it is based on the testimony in this case. Mr. Martin, for instance, has taken five per cent. Mr. Raymond has taken three and one-half to four and one-half per cent" (Record, pp. 79-80, fols. 626-7).

Mr. Martin and Mr. Raymond both used 2½% (Record, pp. 31 and 63, fols. 537 and 598).

Mr. Gilmor had nothing whatever to do with the valuation of merchant vessels until he was made a member of the Joint Army and Navy Board and the Board of Appraisal of Merchant and Private Vessels (Record, p. 82, fol. 633). In 1917 the Board valued the *Havana* and *Saratoga* at $2,240,000 each, which is two and one-half times what they cost in 1906. Mr. Gilmor says this is perfectly consistent with his valuation of the *Proteus* (Record, fol. 665). But it is not. $2,240,000 for the *Havana* and *Saratoga* amounts to $448 per d. w. ton. By the same standard the *Proteus* should be valued at $1,724,000. Yet Gilmor values the *Proteus* at $650,000 or $168 per d. w. ton. The estimated cost of reproducing the *Havana* and *Saratoga* was $3,000,000 (Smith, fol. 553). If we apply the high rate of depreciation urged by petitioner, 5%, at the end of twelve years the *Havana* and *Saratoga* would be worth $1,200,000. Yet the Board on which Mr. Gilmor sat valued them at $2,240,000!

There were three civilians on the Board—Stevenson Taylor, Daniel Bacon and A. L. Swasey. Mr. Taylor was President of the American Bureau of Shipping (Record, p. 84, fol. 636). Mr. Bacon is a shipowner and operator of many years' experience (Record, p. 84, fols. 636-7),

Mr. Swasey is a naval architect and Vice-President of the Herreshoff Manufacturing Company (Record, p. 107, fol. 682). It is significant that neither Mr. Taylor nor Mr. Bacon, men of the widest experience in merchant vessels, was called as a witness.

Mr. Swasey, naval architect, was with the Newport News Shipbuilding Company [illegible] five or six months; with Cramps for a year; and with the New York Shipbuilding Company for four years; he then joined the Herreshoff Company, which has noth[illegible]g to do with merchant vessels, but builds yachts and torpedo boats. He was appointed in 1917 a member of the Joint Board (Record, p. 108, fol. 684). The Board was a[illegible] raising boats so that the Government "would have a general idea what the value ought to be—would have a check" (Record, p. 115, fol. 698).

"Q. So that if the Navy took over under requisition a boat and the Navy had to pay for it he (Assistant Secretary Roosevelt) would have a guide in this preliminary appraisal of yours, is that it? A. Yes, sir" (Record, p. 115, fol. 698).

Mr. Swasey was not an expert on the value of merchant vessels.

"Q. While you were no doubt a very valuable technical man on these Boards, you would not go so far as to say that you were a real expert on the market value of ships when you went on this Board on April 21, 1917? A. I would say that I was primarily chosen as expert on yachts and motor boats."

"Q. Were you an expert on the market value of yachts at that time or the cost of building them or the method of constructing them? A. No, the cost of building them and method of construction" (Record, p. 118, fol. 703).

The above summary confirms the conclusion of the Circuit Court of Appeals that the greater weight of persuasive testimony favors the proof offered in behalf of the *Proteus*. Certainly, Mr. Martin, the most experienced marine surveyor in New York, and Messrs. Smith and Raymond, presidents of two of the largest American steamship companies, are far more competent to pass on the value of an American steamer than any of the petitioner's witnesses.

2. THE CIRCUIT COURT OF APPEALS RIGHTLY HELD THAT THE HIGH COST OF REPRODUCTION WAS NOT ARTIFICIAL OR FICTITIOUS.

This Court has often held that evidence of cost of reproduction is to be considered in the ascertainment of value. *Southeastern Telephone Co.* v. *Public Service Commission* (262 U. S. 276, 287); *Bluefield Company* v. *Public Service Commission* (262 U. S. 679, 689); *Georgia Railway* v. *Railroad Commission* (262 U. S. 625, 629).

This is also the law of England.

> *In re Arbitration between the Mersey Docks and Harbor Board and the Lords Comissioners of the Admiralty,* 3 K. B. Div. (1920), p. 223.

In that case the Mersey Docks and Harbor Board contracted with certain shipbuilders to build a hopper barge. On February 8, 1917, when the barge was approaching completion the Admiralty requisitioned her in her unfinished state for Admiralty service. Later, in August, 1917, the Admiralty purchased the barge for the original contract price, to be paid by them to the shipbuilders. The evidence showed that if the barge had

not been requisitioned she would have been completed and delivered to the Board in April, 1917. On account of the war, it was impossible for the Board to replace the barge by another of the same kind in less than three years from April, 1917, or at a cost less than three times the original contract price. These proceedings were to determine the compensation which should be paid by the Admiralty to the Board. Reading, *C. J.*, said:

"In my judgment it is sufficient for the purposes of this case to say that the Board are entitled to have the property which, but for the action of the Admiralty, would have been in their possession in April, 1919, replaced by the Admiralty. As it cannot be replaced except by the expenditure of money, they are entitled to the amount of money which would represent the cost to them of the replacement" (p. 233).

The above case was cited with approval by this Court in *Brooks-Scanlon* v. *U. S.* (265 U. S. 106).

No better evidence of the cost of replacing the *Proteus* could be desired than the estimate of her builders. This evidence is found in the full and accurate testimony of Frederick B. Palen, vice-president of the Newport News Shipbuilding & Dry Dock Company, who had been with that company over twenty-five years. His company built the *Proteus*, and he calculated that in August, 1918, it would cost $1,750,000 to replace her. He explained in detail how he arrived at the figure.

"Well, the way we arrive at the cost is that I ask our estimating department at the Works to prepare an estimate on the actual cost of the labor and material, and that is usually done by a staff of estimators under the supervision of a head estimator, and the reason which you brought out about the estimate being then under different influences is explained by the way we make it, that the men who make this estimate and figure out the

weights of the ship and apply the factors of the cost to these weights do not know what the estimate is for, and their only object is to get the estimate which may be the basis of the estimate which they prepare as nearly accurate as they can get it, and that is their whole employment with us, and then they furnish to me these figures of the estimated labor and material in our plant and then I take these figures and apply to these the cost of our expenses in connection with the handling of the work and any independent conditions that may prevail in the market as to a rising or declining market and use our judgment on that and also the amount of profit I think that the circumstances or the market conditions justify.

"Q. You are testifying as to a course adopted by your organization? A. Yes.

"Q. What I am seeking to learn is what you actually did when you were called upon to give this estimate of the price of the *Proteus*. A. I actually asked our organization to supply me with the figures of the estimated cost of the labor and material in accordance with our usual custom and on these figures I based the selling price which I have given.

"Q. Did you specify that it was to be an exact reproduction of the *Proteus?* A. Yes" (Record, pp. 128-9, fols. 722-3.

* * * * * * *

"Q. What I am driving at is this: In your estimate on this reproduction did you actually figure the exact duplication of the *Proteus?* A. Yes, we figured an exact duplication and we took the exact weights of the ship as they were exactly and the estimates were based on ~~this~~ those.

"Q. And you took this as it was originally constructed or with any improvements? A. No, we took it as it was originally constructed" (Record, pp. 133-4, fol. 733).

The only criticism which counsel for the petitioner made of this estimate was the alleged high plus of 17½%, but Mr. Palen showed that in August, 1918, the prevailing rate was from 15% to 25% and that the rate he took was equivalent to 10% in 1900.

"A. The plus I used here was 17½% and it amounted to $261,450.

"The Commissioner: What was the plus in 1900 on the original boat?

"The Witness: The plus in 1900 was about 10%.

"The Commissioner: Was that the prevailing rate of plus in 1900?

"The Witness: Yes, at that time it was a very low market. In 1918 it varied all the way from 15 to 25%. We were charging usually 17½% after the market opened.

"The Commissioner: It made the same thing for you in 1918 that 10% made in 1900?

"The Witness: Yes" (Record, p. 127, fol. 719).

Petitioner's witnesses found the cost of reproduction by multiplying the original cost by two and one-half, a purely arbitrary figure. Of that method Mr. Palen testified as follows:

"Q. One of the witnesses here the other day said that in his opinion a fair way of getting at the cost of reproduction in August, 1918, would be to multiply the cost of a ship by 2½, the cost of a ship of this age being eighteen years, by 2½. What do you say as to the fairness of that? A. That is quite unreliable and that is not the way any shipbuilding people who have to determine the price they put in for a ship, arrive at the cost of a ship. If the factor of 2½ differs the slightest bit from the actual factor it should be, you get a very great error in your price. I can describe if you want how we make an estimate" (Record, p. 122, fol. 710).

The soundness of Mr. Palen's criticism may be tested by comparing his estimate with that of Cramp's Shipyard for replacing the *Havana* and *Saratoga*. Their figure was $3,000,000 for each vessel, which amounted to $468 per gross ton or $600 per deadweight ton or 3⅓ times their original cost. Mr. Palen's estimate of the cost of reproducing the *Proteus* amounted to $437 per deadweight ton,

or three times her original cost. The estimate of petitioner's witnesses are mere conjectures.

The Commissioner and the District Court discounted the cost of production as testified to by claimant's expert witnesses and by Mr. Palen, for the reason that they regarded the high prices of 1918 as artificial and fictitious. The Circuit Court of Appeals held that although these prices were brought about by unusual economic conditions, and may not have been expected to survive indefinitely, nevertheless there was nothing fictitious or artificial about them (Record, p. 229). This holding finds ample support in recently decided cases. In *Southeastern Telephone Co.* v. *Public Service Commission* (262 U. S. 276, 287-8), a rate making case, this Court said:

"Obviously the Commission undertook to value the property without according any weight to the greatly enhanced costs of material, labor, supplies, etc., over those prevailing in 1913, 1914 and 1916. As a matter of common knowledge these increases were large * * * It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made."

And in *Bluefield Company* v. *Public Service Commission* (*supra*) it was said:

"The record clearly shows that the Commission in arriving at its final figure did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war as established by the uncontradicted evidence; and the Company's detailed estimated cost of reproduction new less depreciation at 1920 prices appears to have been wholly disregarded. This was erroneous.' p 689

The period of high values was not brief and momentary. It began before we entered the war. Even before

1917 vessels were selling at $300 per ton and the high values continued "up to the first of the year" (1920, the "peak" being about the end of the war (Martin, Record, p. 33, fol. 540).

This is confirmed by petitioner's witness Morrell:

"Q. After the Armistice prices remained very high for the construction of vessels? A. Yes.

"Q. And continued to be high until the latter part of 1919? A. Yes" (Record, p. 77, fols. 623-4).

In *Consolidated Gas Company of New York* vs. *Newton*, 267 Fed. 231, Learned Hand, *J.*, in discussing the high prices of labor and materials during and after the war said:

"Several reasons lead me to believe that present price levels are not merely transitory, though I recognize the danger of any prophecy. Whatever their precise cause, it is universally conceded to be due to the Great War, and by that I mean, of course, not to the prosecution of hostilities but to the economic exhaustion and inflation of the circulating medium which these involved" (p. 234).

"The period, despite its unusual character, I find to be a sufficient basis for the calculation of the cost of reproduction and the rate base for a future time long enough to call for some judicial action" (p. 236).

In *New York Telephone Company* v. *Prendergast* (300 Fed. 823), the C. C. A., 2nd Cir., referring to inflated values, said:

"The goal of investigation is present value, and, since all value rests on the appreciation or estimate of users of the thing valued, all value is a matter of opinion, and a good opinion is only ripened experience. Again, value for practically every legal purpose can be expressed only in terms of money, and present value can only be stated in terms of present money. It makes no difference that

some regard prices as inflated, and others think dollars deflated; we have no other way of expressing present prices or values except in present money" (p. 825).

In *The Kia Ora*, 252 Fed. Rep. 507, the Circuit Court of Appeals for the 4th Circuit, in valuing a vessel in 1917, took into consideration the high prices existing during the war. A vessel built at a cost of $700,000 was valued at $1,772,620, or about 2½ times the original cost.

Another illuminating instance is that of the steamers *Havana* and *Saratoga*. These vessels were built in 1906, at a cost of $900,000 each. They were taken over by the Government during the war and a board appointed by the Navy Department consisting of Naval officers, Naval constructors and engineers appraised the vessels and paid the owner, the New York and Cuba Mail Steamship Company, $2,240,000 for each vessel (Smith, Record, p. 37, fol. 551). This is equivalent to $350 per gross ton or $448 per deadweight ton.

In *Laird Line* v. *Clan Line* (1924), 19 Lloyd's List L. R. 394, the question involved was the value of the steamship *Rowan*, which was sunk by collision with the steamship *Clan Malcolm*, Lord Constable in commenting upon the appreciation of vessel property during and after the war said:

"It is common knowledge that the value of shipping greatly appreciated during the war, that the appreciation continued for a considerable time thereafter, and that it was succeeded by a heavy depreciation. The chief slump occurred in 1920. An instructive chart was produced by Mr. Bateman, of Messrs. Kellock & Co., shipbrokers, London, showing the variation in values from 1898 to 1924. It related to a 7500-ton cargo steamer of ordinary type, and showed that the value of such a

steamer (new) was in 1909 £36,000; that in 1920 it rose to £259,000, and that in October, 1921, it fell to £60,000.

"It was also proved that the cost of construction of new vessels did not vary in the same way as market values; but fell much more slowly. It was admitted that, at the date of the collision, it would have cost £118,000 to build a vessel of the same construction as the *Rowan*, though she cost only £41,665 to build in 1909" (p. 395).

The respondents are entitled to be compensated on the basis of the prices current at the time the *Proteus* was lost as in the case of the *Mersey Docks & Harbor Board, supra,* where Reading, *C. J.*, said the cost of reproduction

"must be measured with regard to the special circumstances arising from the war, and more especially to the increase in the value of labor and materials" (p. 223).

3. A RATE OF DEPRECIATION OF 2½% WAS FAIR AND REASONABLE AS APPLIED TO THE PROTEUS.

Judge Manton was clearly right in saying that "there is no fixed rule as to the amount of depreciation". He pointed out that "the rule has varied between three and five per cent. for depreciation in tax matters", and that the reason two and a half per cent. was used by the experts in the case at bar was because of the unusual high standard of upkeep of the *Proteus* (Record, p. 230).

Mr. Smith of the New York and Cuba Mail Steamship Co. (Ward Line) testified:

"That is a very difficult subject, one that has been discussed of late a great deal by shipowners, what is a fair depreciation. I can say to you very frankly there are ships I would charge 10 per cent. off for depreciation on, and there are others that two per cent. is quite ample. It depends on the care that the owner takes of his vessel. There are many owners that go on the theory that an ounce of prevention is better than a pound of cure, and

they keep their vessels in such a state of efficiency that when the periodical survey comes there is practically nothing to do to them. There are others who run them for all they are worth to get all that they can out of the ships, and when the periodical survey comes spend a quarter or a half of what the vessel originally cost to practically restore her. The policy of the Southern Pacific has been similar to ours. They are very jealous with their fleet. They have ample means and they keep their vessels way up to the top notch. That is their reputation.

"Q. Is that their reputation or do you know that from observation? A. From observation, yes. I cannot answer of course as to every single reverse bar, and that every tank top is in condition" (Record, pp. 40-1, fols. 554-5).

Mr. Martin testified that in normal times the depreciation used was as high as 5% (Martin, Record, p. 30, fol. 534) but in valuing the *Proteus* he used 2½%, which he regarded as conservative.

"The Commissioner: Taking these sales that you know about and that you have taken into consideration, with the amounts for which the sales were made, about what would it have cost to build a new vessel at that time less two and one-half per cent. per year for depreciation?

The Witness: It is even less than two and one-half per cent. For instance, you take the vessel I spoke of, that vessel could have been built at the time she was sold for about $175 a ton, and yet she sold for $170.

The Commissioner: And really you are being conservative?

The Witnesss: Yes, very conservative" (Martin, Record, p. 34, fols. 541-2).

Mr. Raymond used 5% and gave the claimant a credit of 50% for keeping his vessels up better than others, which substantially amounted to a depreciation of 2½% (Raymond, Record, p. 63, fols. 597-8).

The rates used by the petitioner's witness Morrell—4% for 14 years and 2½% for 4 years—were based, he says, on the testimony in this case:

"Part of it is based on the testimony in this case. Mr. Martin, for instance, has taken five per cent. Mr. Raymond has taken three and one-half to four and one-half per cent" (Morrell, Record, p. 80, fol. 627).

But both Martin and Raymond used 2½% (fols. 537 and 598).

Mr. Swasey and Mr. Gilmor used the Stevenson Taylor table of depreciation, which depreciates an 18 year old vessel to about .452 of her cost. This was the same table which, Mr. Gilmor testified, was used by the Board of Appraisal for Merchant and Private Vessels, of which he was a member. Although he endeavored to reconcile his valuation of the *Proteus* arrived at by using a rate of depreciation of about 5%, with the valuation placed upon the *Havana* and *Saratoga* by this Board, he failed to do so. The estimated cost of reproducing the *Havana* and *Saratoga* was $3,000,000 (Smith, Record, p. 39, fols. 551-2). If we apply the high rate of depreciation urged by the petitioner, 5%, at the end of 12 years the *Havana* and *Saratoga* would be worth $1,200,000. Yet the Board on which Mr. Gilmor sat, valued them at $2,240,000. It is clear that in valuing the *Havana* and *Saratoga* the Board must have used a rate of depreciation of about 2% for twelve years.

Not only the respondents', but also the petitioner's witnesses testified that the *Proteus* was unusually well kept up. Petitioner's witnesses, however, failed to give credit for this factor and applied the Stevenson-Taylor

table arbitrarily. This accounts for the great difference in the valuations of the respondents' and the petitioner's witnesses. The Stevenson-Taylor Depreciation Table should not be arbitrarily applied, for it completely ignores the upkeep of vessels and applies the same rule to tramps and to vessels like the *Proteus*, which was not an average, but an exceptional, vessel.

Mack, *C. J.*, found that the *Proteus* "like the other vessels of the claimant, was excellently maintained * * *". And he was of opinion "that the Stevenson-Taylor depreciation table is not to be arbitrarily applied in a case of this kind and that consideration is to be given to the actual upkeep of the vessel in question in determining the percentage of depreciation" (Opinion, Record, pp. 195-6, fol. 861).

It is true that cases involving taxes can be found where a rate of depreciation as high as 5% has been held fair, but it is to be noted that in none of those cases is there the important element of high standard of upkeep. There are also cases where 3% has been held to be a fair rate of depreciation. See the decision of the Committee on Appeals and Review of the Treasury Department, Accumulative Bulletin No. 2, January-June, 1920, page 139, in which case the representatives of various steamship companies appealed from a decision of the Income Tax Unit fixing 2% as the rate of depreciation allowable on their steamships. The Committee held upon the facts that 3% was the proper allowance.

It is pointed out (Petitioner's brief, p. 81) that the Southern Pacific Co. depreciated the *Proteus* on its books three and three-fourths per cent. per annum. This is of

little evidential value. In *New York Telephone Co.* v. *Prendergast* (*supra*) the Court said:

"In fact, the depreciation reserve is a piece of book-keeping, a monthly charge against earnings, to provide means, not only of covering deterioration from use and time, but of minimizing, and only minimizing, future possible losses of any kind, from storm or fire to changes of fashion.

* * * * * *

"To deduct from the fair value of plaintiff's property the entire book reserve for depreciation, in order to reach a rate base, was error of law. In point of fact the property had not depreciated that much; the commission did not find any such depreciation. It did hold that plaintiff was estopped by the figures of the book reserve; it was 'bound by its own contention', because 'these depreciation reserves represent the company's own best estimate of the extent to which their own property has aged.'

"This is merely untrue; the book charges represent what observation and experience suggested as likely to happen, with some margin over. The legal error is in not recognizing that the law requires deduction only for actual depreciation, just as actual as the present value, and the extent of that depreciation must be ascertained by the same kind of evidence; in the last analysis, opinion based on contemporary investigation. The rule enforced by the commission would cause some alarm, if a catastrophe of nature instantly produced a deterioration of 50 per cent. when the book reserve was but half that amount; yet a real estoppel must always be mutual, and it is a poor rule that does not work both ways" (pp. 824, 5-6).

As the *Proteus* was unusually well kept up, she should be given credit, in determining a proper rate of depreciation. Petitioner's witnesses ignored this factor and used 5%, and it may be well said of them, rather than of the Circuit Court of Appeals, that due consideration was not given to this subject in its application to the valuation

of the *Proteus* (Petitioner's brief, p. 81). The following statement is found in petitioner's brief, page 81:

"There was some testimony to the effect that the *Proteus* had been well-maintained; but, such testimony was in the nature of 'hearsay', as those who testified had not recently been on board that vessel. It is also to be remembered that she had been in war service for a considerable time, and there is not any evidence whatever that the *Proteus* had undergone reconditioning or repairing during that period at least."

This is quite inaccurate. Amos S. Hebble, the Superintending Engineer of the Southern Pacific Company, testified as follows:

"Q. But the upkeep year by year, who took care of that? A. That is taken care of generally by the Southern Pacific Company's own shops.

Q. Where are their own shops? A. At Piers 49 and 50 North River.

"Q. And where was she docked? A. She was docked at Tietjen & Lang's, Hoboken, and the Robins Dry Dock Company.

Q. Who supervised those repairs? A. I did.

"Q. And upkeep? A. I did.

"Q. What do you say as to the character of the upkeep of their boats, or of this boat? A. The '*Proteus*' was maintained to a very high standard as is the general practice of the Southern Pacific Company.

"Q. Can you speak of it comparatively, in comparison with others? A. The standard of maintenance of the '*Proteus*' is very much higher than most other companies operating out of this port and as good as any" (Hebble, Record, pp. 46-7, fols. 566-7).

And Frank S. Martin testified:

"Q. Do you know the steamship *Proteus* of the Southern Pacific? A. I do.

"Q. How long have you known her? A. Almost from the time she was built.

"Q. When was that? A. In 1900, in May.

"Q. She was built where? A. At the Newport News Shipbuilding Company, Newport News, Virginia.

"Q. Give her dimensions for the sake of convenience? A. She was 405 feet over all, 390 feet between perpendiculars, 48 feet beam, 32 feet 9 inches depth, 3,006 net tons, and 4,836 gross tons registered.

"Q. Do you happen to know her dead weight? A. Dead weight about 4,000 tons.

"Q. She was a single screw? A. Yes, a single screw.

"Q. Steel? A. Steel triple expansion engines, and Scotch boilers.

"Q. How lately had you seen her before she was lost in the month of August, 1918? A. A few months before.

"Q. For what purpose, what occasion? A. I made a great many surveys of Southern Pacific vessels from time to time.

* * * * * *

"Q. Are you able to say whether the *Proteus* had been kept up and what her condition was a few months prior to her loss? A. I would say the *Proteus* is as well kept up as any vessel they had, and the vessels of the Southern Pacific were all kept up well. I examined the *Comus* last summer in regard to her condition and she was well kept up" (Martin, Record, p. 28, fols. 530-1).

This testimony was corroborated by Mr. Smith (Record, p. 40).

We submit that in view of this undisputed evidence to the effect that the *Proteus* was unusually well kept up, a rate of depreciation of 2½% was fair and reasonable.

4. Original Cost, Book Value, and Insured Value.

The petitioner argues that evidence regarding the original cost of the *Proteus,* her book value, and her insured value was disregarded by the Circuit Court of Appeals. Evidence of the original cost and of the book value of the *Proteus* was produced by the respondents themselves. As to insurance value, it was well under-

stood that the *Proteus* was insured against marin perils and it was a fair presumption from the evidence that she was insured on the same terms and in the same amount as her sister ship, the *Comus* (Record, fols. 792, 794, 795, 796 and 798). All these facts were before the Court, for what little they were worth, and it is pure assumption on the part of the petitioner's counsel to say that they were disregarded.

Original cost is valuable only insofar as conditions at the time of construction were the same as at the time of fixing the value. The value of property may be far greater than its cost. *Brooks-Scanlon* v. *United States, supra* (p. 863).

In *Mobile Gas Co.* v. *Patterson* (293 Fed. 208) the court in commenting upon the weight to be given to original cost said:

"The present reasonable market value is the test which is ordinarily adopted; but where there is no established reasonable market value for any reason, the court must resort to such other methods of arriving at a just conclusion as may be available; and in determining this question much, little, or no light may be obtained from an inquiry as to what the owner actually paid for the property, according to circumstances. If the purchase has been recent and made in the ordinary course of dealings, it may serve to throw doubt upon the insistence of the plaintiff that the reasonable value of the property was much greater than the purchase price, or upon the insistence of the defendant that it is much less; but if the purchase was made at a remote period when the conditions were greatly different from those prevailing at the time of the inquiry, the original cost of the property is of little or no evidential value" (p. 214).

In like manner book value bears little or no relation to actual value. It is simply a matter of bookkeeping, by which the value of the vessel is written off from year

to year in order to create a reserve for future contingencies.

The amount of insurance placed on a vessel is *res inter alias acta* and is not evidence of her actual value.

Petitioner's witness, Walker, who testified that the *Comus* was insured for $690,000, when asked on cross-examination if he thought that amount represented the value of the *Comus* in 1918, answered in the negative (Record, p. 173, fol. 810). On further cross-examination he said he thought the value of $690,000 was too low.

"Q. When you said a moment ago that you did not think the value of $690,000 approximately represented the true value may I ask you whether you think it is too low or too high? A. *I should think it was low*" (Record, p. 174, fol. 813).

In *Union Pacific Railroad Co.* v. *Lucas,* 136 Fed. 374, the court said of this species of evidence:

"The theory and practice of insurers and insured is to make the limit of insurance much less than the value of the property, while owners are permitted to procure insurance in amounts far below this limit. The result is that the amount of insurance has no fixed or uniform relation to the value of the property it covers, and hence does not directly tend to disclose its value."

The same rule was adopted in *In re Commissioners to appraise Washington Market Co.* property, 295 Fed. 950. The Court of Appeals, District of Columbia, there said:

"The amount of insurance which an owner places upon a given piece of property is little or no index of its value. One may feel impelled to carry a much larger percentage of risk than another" (p. 954).

The petitioner is naturally dissatisfied with a decision which largely increases its liability. The Commissioner

frankly stated on the excellent authority of Judge Addison Brown that in his finding he approached the question as a jury would after hearing all the facts and circumstances. The same thing is true of Judge Mack. The judges of the Circuit Court of Appeals weighed the evidence, considered all the facts and came to a different conclusion from the Commissioner and Judge Mack.

Now, having reached this Court on *certiorari,* the petitioner asks this Court to pass once more on this question of fact. We respectfully submit that this Court should refuse to retry a question of fact.

Résumé of Evidence of Value

A. Respondents' Witnesses.

		Per Gross Ton	Per Dead Weight Ton
Martin	$1,225,000	$253.00	$318.00
Raymond	1,297,000	267.00	337.00
Smith	1,350,000	279.00	350.00

B. Petitioner's Witnesses.

		Per Gross Ton	Per Dead Weight Ton
Morrell	$630,000.	$130.00	$163.00
Gilmor	650,000.	134.00	169.00
Swasey	611,000.	127.00	158.00
Walker	Higher than 690,000.		

C. Valuations of other vessels:

Vessel	Original Cost	Valuation	Per Gross Ton	Per Dead Weight Ton
Saratoga	$900,000	$2,224,000	$350.00	$448.00
Havana	900,000	2,224,000	350.00	448.00

See *Kia Ora,* 252 Fed. Rep. 507.

Original Cost	Valuation as of 1917	Per Gross Ton
$700,000	$1,772,600	$270

Valuations of the three above vessels amount to two and one-half times their original cost.

IV. THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

January, 1925.

CHARLES C. BURLINGHAM,
VAN VECHTEN VEEDER,
A. HOWARD NEELY,
Counsel for Respondents.

OCT 13 1923

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 197

STANDARD OIL COMPANY OF NEW JERSEY,
Petitioner,

—against—

THE SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director-General of Railroads,
Respondents.

BRIEF FOR CARGO CLAIMANTS, RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BIGHAM, ENGLAR & JONES,
Proctors for Cargo Claimants, Respondents.

D. ROGER ENGLAR,
E. CARMODY JONES,
Of Counsel.

Supreme Court,

OF THE UNITED STATES,

OCTOBER TERM—1923.

No. 607.

STANDARD OIL COMPANY OF NEW JERSEY,
Petitioner,

—against—

THE SOUTHERN PACIFIC COMPANY, and JAMES C. DAVIS, Director General of Railroads,
Respondents.

BRIEF FOR CARGO CLAIMANTS RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This brief is filed on behalf of cargo claimants.

Their claims, aggregating, with interest, nearly a half a million dollars, have been allowed both by the District Court and by the Circuit Court of Appeals, and the petitioner no longer contests the right of these claimants to recover the sums awarded to them by the decree of the District Court. In addition to these claims there are numerous claims of passengers and of the crew of the *Proteus* for loss of personal effects, as well as two claims for personal injury.

The causes of action for the claims mentioned arose out of the sinking of the steamship *Proteus*

on August 19th, 1918, more than five years ago. This litigation has been in the Courts for more than four years. If this Court should grant the prayer of the petition, a further long delay would intervene before the claimants, mentioned above, would receive payment of their claims, which are no longer disputed. We feel that it is not inappropriate that, on behalf of such claimants, we submit reasons for the denial of the petition.

The petitioner apparently has so little confidence in the First Point of its brief, that it has appended a second point. In the Second Point it relies on allegations of the petition (pp. 5, 6, 7 and 8) which set up facts not to be found in the record. The petition alleges that, since the expiration of the term of the Circuit Court of Appeals, at which the decision was handed down in this case, it has come to the attention of the petitioner's counsel that a final settlement has been arrived at between the Railroad Administration and the Southern Pacific Railroad Company, by which the liability of the Railroad Administration for the loss of the *Proteus* has been finally satisfied and extinguished by payment, credit or adjustment of the value of the *Proteus*. It is not alleged, however, that diligence on the part of the petitioner or his counsel would not have disclosed these facts. Nor could such an allegation be made, because it appears from the answer filed to the petition, praying for limitation of liability, by the Southern Pacific Company, that this answer was filed on behalf of the Southern Pacific Company, as owner of the steamship *Proteus*, and Walker D. Hines, as Director General of Railroads jointly, and from the petition which

was filed by the Southern Pacific Company to limit its liability, that the Southern Pacific Company alleges that it was the owner of the *Proteus;* that the *Proteus* had been taken over by the President of the United States, pursuant to an Act of Congress of August 29th, 1916; and that the President took possession of the said ship on December 28th, 1917, pursuant to a proclamation made by him on December 29th, 1917. It is also alleged that the *Proteus*, at the time of her loss, was in the possession and control of, and was operated by William G. McAdoo, as Director General of Railroads, who manned, victualed and navigated the vessel at his own expense.

The Admiralty Rules promulgated by this Court (Admiralty Rule XXXI), gave the petitioner the widest latitude in addressing interrogatories to the Southern Pacific Company and to the Director General of Railroads, but the petitioner did not avail itself of this privilege. It awaited the decree of the District Court and of the Circuit Court of Appeals before seeking to make any inquiries. This delay is all the more difficult to understand when reference is made to the last paragraph of Judge Mack's opinion. Judge Mack says:

> "The claimant and Director General, I assume have come, or will come, to an agreement regarding their respective rights as to the interest accruing during the period of requisition. Unless some agreement has been reached I assume that the Government is entitled to the interest during the period of requisition and the claimant to its agreed compensation" (Record, p. 862).

Whatever may have been in the petitioner's mind before Judge Mack's opinion was filed, it cannot be said, after it was delivered, that the petitioner was ignorant of the fact that the Southern Pacific Company and the Director General had some differences to compose. It should be borne in mind also that this opinion was delivered before the entry of the final decree in the District Court.

Under such circumstances, it is respectfully submitted that the petitioner is not in a position to ask relief from this Court which, if it had been diligent, it could have obtained from either of the Courts below. And when, to grant the petition, the payment of claims which are no longer disputed would be postponed for more than a year, it is respectfully submitted that such a hardship should not be imposed on such claimants. No sufficient reasons appear in the petition to sustain the petitioner's application. In fact it sets up the want of diligence of the petitioner as a ground for the issuance by this Court of the extraordinary writ of certiorari.

It is respectfully submitted that the application for a writ of certiorari should be denied.

BIGHAM, ENGLAR & JONES,
Proctors for Cargo Claimants-Respondents.

D. ROGER ENGLAR,
T. CATESBY JONES,
Of Counsel.

NOV 22 1923
WM. R. STANSBURY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1923—NO. [redacted] 197

STANDARD OIL COMPANY (NEW JERSEY),
Petitioner,

—against—

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads,
Respondents.

MOTION.

(1) That the order of this Court on November 12, 1923, granting a petition for a writ of certiorari be restricted to the respondents Southern Pacific Company and Director General of Railroads, and be vacated as to the personal injury, cargo and passenger claimants against whom no error is assigned in the petition; and/or

(2) That the transcript of record be diminished by at least 500 pages so as to include only evidence bearing directly or indirectly on the errors of law assigned in the petition and brief for certiorari.

D. ROGER ENGLAR,
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JAMES W. RYAN,
Counsel for Roberts, Carter & Company and other cargo claimants.

HENRY O. FALK,
LAWRENCE B. COHEN,
Counsel for Bonita Hearn and Dolores Francis, personal injury and passenger claimants.

Supreme Court of the United States,

OCTOBER TERM, 1923—No. 607.

STANDARD OIL COMPANY (NEW JERSEY),
Petitioner,

—against—

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS,
Director General of Railroads,
Respondents.

MOTION.

(1) That the order of this Court on November 12, 1923, granting a petition for a writ of certiorari be restricted to the respondents Southern Pacific Company and the Director General of Railroads, and be vacated as to the personal injury, cargo and passenger claimants against whom no error is assigned in the petition; and/or

(2) That the transcript of record be diminished by ~~at least~~ 500 pages so as to include only evidence bearing directly or indirectly on the errors of law assigned in the petition and brief for certiorari.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The motion of Roberts, Carter & Company, cargo claimant, and Bonita Hearn and Dolores Francis, personal injury and passenger claimants, on their own behalf and on behalf of the other cargo, personal injury, and passenger claimants similarly interested, respectfully shows:

Facts.

1. In August, 1918, the steamships *Cushing* and *Proteus* collided at sea. The *Proteus* sank with her cargo and passengers' baggage. The lower courts concurred in finding both vessels at fault for the collision. They also concurred in directing that the cargo and passenger claims be paid in full by the *Cushing* before payment of the excess over half damages to the other wrongdoer, the *Proteus*. The personal injury, cargo and passenger claims amounted, without dispute, as of the date of the final decree, to $455,529.69. The *Cushing* gave security for, and her value was fixed in the limitation proceedings at $1,235,000.

2. The Trial Court found that the *Proteus*, before sinking, was worth $750,000 and, for the purpose of apportioning the half damage liability, assessed her owner's damages at that sum. On appeal the Circuit Court of Appeals increased the valuation of the *Proteus* to $1,225,000.

3. The Standard Oil Company, as owner of the *Cushing*, petitioned this Court for *certiorari* on two grounds: (1) that the damages and value of the *Proteus* were $750,000 as assessed by the Trial Court; and (2) that the settlement between the Southern Pacific Company, owner of the *Proteus*, and the other joint tort feasor, the Director General of Railroads, was a waiver of any right of recovery by the Southern Pacific Company from the *Cushing*. This second point was not suggested to the lower courts.

4. No error was assigned in the petition or brief for *certiorari* affecting the personal injury, cargo or passenger claims. The facts showing fault of both vessels in the collision have been concurrently found

by the lower courts. This Court, therefore, under the well-settled rule, will not consider them on *certiorari.*

5. The personal injury, cargo and passenger claimants are not interested in this controversy. The controversy is solely between the owners of the two vessels involved. It relates only to the errors of law assigned in the petition and brief.

Objects of the Motion.

1. The personal injury, cargo and passenger claimants, therefore, ask that they be severed from the case, and that a mandate as to their claims issue immediately. They have been deprived of their cargo and baggage for more than five years. The petitioner has suggested no reason why they should await the determination of this cause on *certiorari.* If they are not severed, or a ruling made at this time by the Court for diminution of the 912-page printed record so as to include only evidence bearing directly or indirectly on the errors assigned in the petition for *certiorari,* the Court will be burdened with argument and briefs on questions of fact which have been concurrently found by the lower courts and which consume more than 500 pages of the record.

2. The severance of the personal injury, cargo and passenger claims will in no way affect the continuation of the controversy between the two vessels. The respective vessel owners' petitions were consolidated for trial (Record, Vol. 2, p. 863). The personal injury, cargo and passenger claims were tried at the same time as the consolidated cause to avoid duplication of evidence on the question of fault in the collision; but each claim was separately proved and was indi-

vidually awarded in the final decree (Record, Vol. 2, pp. 870 to 896).

WHEREFORE, Roberts, Carter & Company, Bonita Hearn and Dolores Francis, on their own behalf and on behalf of the other personal injury, cargo and passenger claimants similarly interested, respectfully move:

(1) That the order of this Court on November 12, 1923, granting the petition of the Standard Oil Company (New Jersey) for a writ of *certiorari* be restricted to the respondents Southern Pacific Company and James C. Davis, Director General of Railroads, and that it be vacated as to the personal injury, cargo and passenger claimants against whom no error is assigned in the petition or brief for *certiorari;* and/or

(2) That the transcript of record filed by the petitioner for *certiorari* be diminished by at least 500 pages so as to include only evidence bearing directly or indirectly on the errors of law assigned in the petition and brief for *certiorari.*

Dated, New York City, November 13th, 1923.

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Roberts, Carter & Company and other cargo claimants.

HENRY O. FALK,
LAWRENCE B. COHEN,
Counsel for Bonita Hearn and Dolores Francis, personal injury and passenger claimants.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1923—No. 607.

STANDARD OIL COMPANY (NEW JERSEY),
Petitioner,

—against—

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS,
Director General of Railroads,
Respondents.

MEMORANDUM IN SUPPORT OF MOTION.

I.

This Court in granting the petition for certiorari did not intend to bring before it personal injury, cargo and passenger claimants whose claims are not contested by the petitioner.

Even if this Court should reverse the judgment of the Circuit Court of Appeals on both the grounds assigned as error in the petition and brief for *certiorari*, the passenger and cargo claimants would recover exactly the same sums awarded to them under the present judgment. See *The Beaconsfield*, 158 U. S. 303, where this Court held that the claims of innocent cargo owners are entitled to priority over the claim of the vessel owner against the fund available for the payment of damages sustained through a collision for which both vessels have been adjudged at fault. See also *The Atlas*, 93 U. S. 302, 315, and *Lovejoy* v. *Murray*, 3 Wall. 1.

The rule has long been settled, that, after an appeal is taken, the parties to the appeal are really the appellants and those parties to the action, whether plaintiff or defendant, who have an interest in sustaining the judgment or order appealed from. *Hiscock* v. *Phelps*, 6 Lans. 105. The cargo and passenger claimants have no interest in sustaining the decree of the Circuit Court of Appeals in so far as it is attacked by the errors assigned in the petition and brief for *certiorari*.

We need only refer to the elementary rule as stated in 8 Cyc. 611, under the title Consolidation and Severance of Actions; that

> "An appeal in one suit (of a consolidated cause) will only bring up that case, leaving the other causes in the Court below, and the decree as to them in full force and effect."

In *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285, 293, this Court, speaking of causes which had been consolidated said:

> "But although the defendants might lawfully be compelled, at the discretion of the Court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments."

In *Hanrick* v. *Patrick*, 119 U. S. 156, 164, this Court held that intervening petitioners in the lower Court, holding substantially the same position to the real parties to the controversy as the cargo and passenger claimants do in this case, were not necessary parties on an appeal. See also *Forgary* v. *Conrad*, 6 Howard 201; *Russell* v. *Stansell*, 105 U. S. 303.

In *Mason* v. *Marine Ins. Co.*, 110 Fed. 452, the United States Circuit Court of Appeals for the Sixth Circuit held that, in a collision case in admiralty, where a decree disposes of a number of distinct claims, an appeal by one party from an adverse decision as to one of such claims does not bring up for review the other portions of the decree.

In *Hume* v. *Frenz*, 150 Fed. 502, the Circuit Court of Appeals for the Ninth Circuit, in a situation on appeal very similar to that existing here, held that the real parties appellant and appellee were the two persons who admitted that either one or the other was liable for the amount of the third person's, the libellant's, claim.

The decree of the Circuit Court of Appeals concurring in the finding of fact that the *Cushing* was at fault, was in effect a dismissal of the personal injury, cargo and passenger claimants from further proceedings by *certiorari*. If one cause of action in a consolidated cause is severable and the parties may be severally liable, a dismissal as to one defendant constitutes a severance of the action. *Schuller* v. *Robison*, 139 App. Div. 97, 123 N. Y. S. 881.

If the District Court or the Circuit Court of Appeals had decided in accordance with the present contentions of the petitioner for *certiorari*, the personal injury, cargo and passenger claimants could not have appealed on those grounds. *Ex Parte Cutting*, 94 U. S. 14; *Guion* v. *Insurance Company*, 109 U. S. 173; *Elwell* v. *Fosdick*, 134 U. S. 513. It has long been the rule in admiralty that when a decree is several and independent as to different parties, each may appeal

separately. *Stratton* v. *Jarvis*, 8 Peters (U. S.) 4; *The Columbia*, 73 Fed. 226 (C. C. A.); *Thomas* v. *Lane*, 23 Fed. Cas. 13, 1902.

In *Oliver* v. *Alexander*, 6 Peters 31 (U. S.), 143, 147, this Court, speaking through Mr. Justice Story, said:

> "The claim of each seaman is distinct and several; and the decree upon each claim is, in like manner, distinct and several. One seaman cannot appeal from the decree made in regard to the claim of another; for he has no interest in it, and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners, or other respondents, is the sum or value of his own claim, without any reference to the claims of others. * * * And the same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman, which exceeds the sum required by law for that purpose, as a distinct matter in dispute. If the law were otherwise, it would operate in a most unjust and oppressive manner; for then the seamen would be compellable to file a joint libel; and if any controversy existed as to the claim of a single seaman, *all the others would be compellable to be dragged before the appellate tribunals, and incur enormous expenses, even when their own rights and claims were beyond all controversy, and, in truth, were not controverted.* The form of procedure would thus be made an instrument to subvert the very object for which it was instituted." (Italics ours.)

The fact that these proceedings were in the form of a petition for limitation of liability is immaterial,

in view of the fact that the limitation fund, consisting of the value of the steamship *Cushing,* is more than sufficient to pay all claims awarded by the judgment of the Circuit Court of Appeals.

II.

This Court in granting the petition did not intend to burden itself with a 912-page printed record, most of which relates to questions of fact concurrently found by the lower courts and not assigned as error.

At least 500 pages of the transcript of record filed in the Circuit Court of Appeals and re-filed by the petitioner in this Court, relate only to questions of fact as to which vessel was at fault for the collision. The courts below have concurred in finding those facts. It is not questioned by the petitioner, and indeed is indisputable that if those findings of fact are correct both vessels were at fault for the collision. This Court has repeatedly held that in admiralty cases it will not disturb concurrent findings of fact of the lower courts.

In *Pacific Mail Steamship Company* v. *Schmidt,* 241 U. S. 245, 250, Mr. Justice Holmes, delivering the opinion of this Court after a hearing on *certiorari,* said:

> "It seems to us a very strong thing to say that any fair construction of the facts brings the case within the act. But as the two courts have agreed upon this proposition also and *as the writ would not have been granted to reopen the inquiry into those particular facts we assume that upon this also they were right.*"

In *The S. B. Wheeler*, 20 Wall. 385, 386, a collision case, this Court said:

> "Questions of fact only are presented by this appeal. There is no dispute as to the law. Two courts have already found against the appellants. It has been over and over again ruled by this Court that under such circumstances the burden is on the appellant to show the error. Every presumption is in favor of the decrees below. We ought not to reverse unless the error is clear. Such is not the case here.
>
> It is, indeed, urged that the claimants, by their own proof, established the fact that there was no lookout at the bow of the *Wheeler* when the collision occurred. *This is so, but whether that was a contributing fault was a question of fact, and that has been twice found against the appellants.*
>
> We are entirely satisfied with all the findings."

In the present case the petitioner for *certiorari* has not even suggested error in any of the concurrent findings of fact of the lower courts as to fault in the collision.

See also:

The Quickstep, 9 Wallace 665, 669;
La Bourgoyne, 210 U. S. 95, 114;
The Conqueror, 166 U. S. 110, 136;
Compania de Navagacion la Flecha v. *Brauer*, 168 U. S. 104, 123;
The Carib Prince, 170 U. S. 655, 658;
Towson v. *Moore*, 173 U. S. 17, 24;
Smith v. *Burnett*, 173 U. S. 430, 436;
Workman v. *New York*, 179 U. S. 552, 555;
Morewood v *Enequest*, 23 How. 491;
The Iroquois, 194 U. S. 240, 247;
The Wildcroft, 201 U. S. 378, 387.

On *certiorari*, assignments of error neither argued nor submitted may be assumed to be abandoned, *Erie Railroad Co.* v. *Collins*, 263 U. S. 85.

In *Green County, Kentucky* v. *Thomas' Executor*, 211 U. S. 598, 601, this Court said:

> "*The case is here upon a writ of certiorari. It has been argued by the defendant, apparently upon the theory that all questions of law which were raised by it or were remotely suggested in the record, were open for consideration in the appellate court. But we ought not to encourage such looseness of practice.* Some of the questions raised by the defendant were passed on adversely to it in the Circuit Court of Appeals, and we do not intend to intimate any doubt of the correctness of the decision of that court. The writ of error sued out by the plaintiffs, and the assignment of errors which accompanied, set forth all the questions regarding the action of the court below, of which the appellate court was bound to take notice. *The Maria Martin*, 12 Wall. 31, 40; *Bolles* v. *Outing Company*, 175 U. S. 262. Neither that court nor this ought to be expected to search through a confused record for the purpose of finding errors." (Italics ours.)

The Court would also be burdened by many briefs on the question of fault in the collision, because in the absence of a definite ruling in advance by this Court, neither counsel for the hull claimants of the *Proteus* and *Cushing*, nor counsel for the cargo passenger claimants could know certainly whether this Court intended to review the entire case *de novo*, including possible errors of fact not assigned in the petition or brief for *certiorari*.

In *Texas & Pacific Railway Co.* v. *Leatherwood*, 250 U. S. 478, 482, this Court said:

> "The record occupies 213 printed pages. Most of the matter which was included in it at the instance of the petitioner was not required for the proper presentation of questions submitted here; much useless expense has been incurred; and both court and counsel have been subjected to the burden of examining much that is irrelevant."

Dated, New York City, November 13th, 1923.

Respectfully submitted,

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Roberts, Carter & Company and other cargo claimants.

HENRY O. FALK,
LAWRENCE B. COHEN,
Counsel for Bonita Hearn and Dolores Francis, personal injury and passenger claimants.

Notice of Motion.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1923—No. 607.

STANDARD OIL COMPANY (NEW JERSEY),
Petitioner,

—against—

SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS,
Director General of Railroads
Respon. nts.

SIRS:

PLEASE TAKE NOTICE that, at the opening of the Court on the 26th day of November, Nineteen hundred and twenty-three, or as soon thereafter as counsel can be heard, a motion, and brief in support thereof, in the form annexed hereto, will be submitted to the Supreme Court of the United States for an order directing

1. That the order of the Supreme Court, entered on November 12th, 1923, granting a petition for a Writ of Certiorari, be restricted to the respondents Southern Pacific Company and the Director General of Railroads, and be vacated as to the personal injury, cargo and passenger claimants against whom no error is assigned in the petition; and/or

2. That the transcript of record be diminished by at least five hundred pages so as to include only evidence bearing directly or indirectly on the

errors of law assigned in the petition and brief for certiorari.

Dated, New York City, November 13th, 1923.

Yours &c.,

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Roberts, Carter & Company and other cargo claimants.

HENRY O. FALK,
LAWRENCE B. COHEN,
Counsel for Bonita Hearn and Dolores Francis, personal injury and passenger claimants.

To:

WILLIAM H. MCGRANN,
JOHN M. WOOLSEY,
Counsel for Petitioner.

CHARLES C. BURLINGHAM,
Counsel for Respondents Southern Pacific Company and Director General of Railroads.

HONORABLE WILLIAM HAYWARD,
United States Attorney,
Counsel for Respondent Cargo Claimant, United States of America.

HAROLD J. ROIG,
J. A. MARTIN,
FRANK M. PATTERSON,
EDWARD B. LEVY,
Counsel for Remaining Cargo Owner and Passenger Respondents.

STANDARD OIL COMPANY OF NEW JERSEY *v.* SOUTHERN PACIFIC COMPANY AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 197. Argued January 19, 1925.—Decided April 20, 1925.

1. The Federal Control Act did not authorize an action in tort by the owner of a vessel against the Director General of Railroads for her loss through collision while operated by the Director General P. 154.
2. Where the Director General, under his contract with the owner for the use and upkeep of transportation properties taken over under the Federal Control Act, made a settlement including an allowance for a vessel lost by collision during operation by the Director General, *held* that the common law rule that one who accepts satisfaction from one of two joint tort-feasors can not recover from the other was inapplicable to extinguish the claim of the owner against the owner of the other vessel in pending limitation of liability proceedings to which both owners and the Director General were parties. *Id.*
3. Upon an appeal in admiralty there is a trial *de novo* opening the whole case, so that a party is not bound by the decree below through failure to join in the appeal. P. 155.
4. In the absence of a market value, such as is established by contemporaneous sales of like property in the ordinary way of business, the damages to which the injured party is entitled in admiralty for the loss of a vessel is that amount which, considering all the circumstances, probably could have been obtained for her on the date of the collision—the sum that in all probability would have resulted from fair negotiations between an owner willing to sell and a purchaser desiring to buy. P. 155.

5. Cost of reproduction as of the date of valuation is evidence to be considered but neither that, nor that less depreciation, is the measure or the sole guide; value is the thing to be found, and there should be a reasonable judgment of this based on a proper consideration of all relevant facts. P. 156.
6. In view of changed prices, *held* that original cost of a vessel was not a useful guide to her value when lost. P. 157.

292 Fed. 560, affirmed.

CERTIORARI to a decree of the Circuit Court of Appeals modifying a decree of the District Court (266 Fed. 570; 285 id. 617) in proceedings for limitation of liability, in admiralty. The District Court found that both the petitioner's vessel and that of the Southern Pacific Company were at fault, and fixed the damages of the latter. The Circuit Court of Appeals found petitioner's vessel alone at fault and increased the damages. For preliminary proceedings in this Court, see 263 U. S. 681, 696; 265 U. S. 569.

Messrs. John M. Woolsey and *William H. McGrann* for petitioner.

The settlement made between the Director General of Railroads and the Southern Pacific Company, by payment to the latter of the value of the Proteus in exchange for a release, constituted a satisfaction of the claim of the Southern Pacific Company in respect of the loss of the Proteus. Any allowance that can now be made herein for the loss of the Proteus can only be for a payment to the Director General of such an amount, not exceeding the amount thus paid by him in settlement, as will represent the value of the Proteus.

When two tort-feasors by their concurrent negligence have caused an injury to a third person, they are jointly and severally liable to him under the salutary doctrine laid down in the overwhelming majority of the courts of this country. *The Atlas*, 93 U. S. 302, at page 318; *Boyer* v. *Sturgis*, 24 How. 122; *Colegrove* v. *N. Y. N. H.*

& *H. R. R. Co.*, 20 N. Y. 492; *Carlton* v. *Boudar*, 118 Va. 521; *Walton, Witten & Graham* v. *Miller*, 109 Va. 210; *Feneff* v. *Boston & Me. Ry.*, 196 Mass. 575; *Cuddy* v. *Horn*, 46 Mich. 596; *Drown* v. *New Eng. T. & T. Co.*, 80 Vt. 1; *Slater* v. *Mersereau*, 64 N. Y. 138; *Corey* v. *Havener*, 182 Mass. 250; *McClellan* v. *St. Paul M. & M. Ry.*, 58 Minn. 104; *Reynolds* v. *Kansas City*, 180 Mo. App. 138; *City of Louisville* v. *Heitkemper's Adm'x*, 169 Ky. 167; *The Ira M. Hedges*, 218 U. S. 264.

There is not any doubt that, under the law as laid down by this Court, the Southern Pacific Company, as the innocent owner, could have sued either the Standard Oil Company or the Director General for the negligent sinking of the Proteus and recovered full damages from either tort-feasor, or it could have sued them jointly and recovered a moiety of its damages from each in the first instance, with a right over against the other tort-feasor for any deficiency not paid by the respondent against whom execution first issued. But once it had received from one of the tort-feasors full satisfaction for its loss, as it has done here, it could not pursue the other tort-feasor for further damages for the excellent reason that it would not have any cause of action left. *The Beaconsfield*, 158 U. S. 303, 307; *The Atlas, supra; Lovejoy* v. *Murray*, 3 Wall. 1; *Jennings* v. *Dolan*, 29 Fed. 861; *Albright* v. *McTighe*, 49 Fed. 817; *United States* v. *Murphy*, 15 Fed. 589; 1 Williston Contracts, § 334, 338a; 26 Harv. L. R., 658; 34 Harv. L. R., 442; 12 Harv. L. R., 66; *Seither* v. *Philadelphia Transaction Co.*, 125 Pa. St. 397.

That leaves the equities of contribution to be worked out between the Director General and the Standard Oil Company. The right of contribution in such a case "belongs to the substantive law of the admiralty." *The Ira M. Hedges, supra; Erie R. R. Co.* v. *Erie & Western Trans Co.*, 204 U. S. 220.

It is settled law that there is a new trial in admiralty on appeal to the Circuit Court of Appeals or on certiorari to

this Court. *Reid* v. *Faryo,* 241 U. S. 544; *Watts* v. *Unione Austriaca,* 248 U. S. 9; *The John Twohy,* 255 U. S. 77. We must look, therefore, at the facts, as now developed on the new evidence taken in this Court. Now that the Southern Pacific Company has been cut out of the case by the satisfaction of its claim, the only question left is what allowance the Director General should have in the collision adjustment in respect of the Proteus. The Director General did not appeal and, therefore, we submit, cannot be allowed more than the District Court allowed as the value of the Proteus. Cf. *The Beaconsfield,* 158 U. S. 303, 310. Certainly there is not any question but that the largest claim which he can now possibly make is for reimbursement to the extent of the amount which he had paid to his bailor in settlement of his contract obligation to make the bailor whole. Cf. *Vermilye* v. *Adams Express Co.* 21 Wall. 138.

The rule of damage applied by the Circuit Court of Appeals is erroneous in that it is based on an arbitrary formula, the two factors of which are a speculative reproduction cost, and an uncertain depreciation rate; which operates to exclude other material factors in arriving at fair valuation. The proper rule is that adopted by the District Court, and by the Commissioner, whereby, in the absence of a provable market value, all other relevant facts are considered in determining the measure of the loss. There was not any market value for the Proteus at the time of her loss. *Gulf Refining Co.* v. *United States,* 58 Ct. Cls. 559. The burden of proof to establish the loss rested on the Proteus interests (Southern Pacific Company and Director General of Railroads). *The Conqueror,* 166 U. S. 110; Sedgwick on Damages, 9th ed. Vol. 1, p. 181. The Circuit Court of Appeals based its valuation squarely and exclusively on the reproduction and depreciation theory. The factor of "cost of reproduction" which was taken to be $1,750,000, is highly speculative and excessive. The second factor, that of "depreciation," which the

Circuit Court of Appeals assumed to be two and a half per cent. per year, was also unreasonable and unduly advantageous to the respondents, and its acceptance greatly enhanced the result obtained by the formula, and to the disadvantage of the petitioner. A rate of five per cent. of the book value (for each year) as depreciation, was held to be a reasonable allowance for deduction from value, in the case of *San Francisco & Portland SS. Co.* v. *Scott, Collector,* 253 Fed. 854; *United States* v. *Standard Oil Co.* 258 Fed. 696; *The Anhauac,* 295 Fed. 346; *The Harmonides,* 1903 Prob. Div. 1.

The application of the reproduction and depreciation method so exclusively is not supported by the weight of authorities. The cases show a wide latitude in considering all elements which bear on the question of the measure of the loss under the circumstances here: *The Colorado,* Brown Adm. 411, Fed. Cas. No. 3029; affirmed, *The Colorado,* 91 U. S. 692; *Leonard* v. *Whitwill,* 19 Fed. 549; *City of Alexandria,* 40 Fed. 697; *The H. F. Dimock,* 77 Fed. 226; *The Mobile,* 147 Fed. 882; *The Lucille,* 169 Fed. 719; *Alaska S. S. Co.* v. *Inland Nav. Co.* 211 Fed. 840; *The Iron Master,* 1 Swabey Adm. Rep. 441; *The Clyde, Id.* 23 (1856); *Shipping Controller* v. *Lloyds Royal Belge Ltd.,* 1 L. R. 231, 389; K. B. D. Com. Court Nov. 10, 1919; *Harries* v. *Shipping Controller* (May 14, 1918), 14 Asp. Mar. Cas. 320; *The Harmonides, supra; The Winkfield* (1902) P. B. 42; 9 Asp. 259 (July 23, 1903); Roscoe on Damages in Marine Collisions, 2nd ed., p. 166; Marden's Collision at Sea, 7th ed., p. 119. All the circumstances bearing on the value of the Proteus to the respondents (particularly in its aspect as a loss) must be considered as relevant in arriving at an amount which would fulfill the requirements of the doctrine of "*restitutio in integrum.*" *The Iron Master,* Swb. 443; *The Harmonides, supra; The Minnesota Rate Cases,* 230 U. S. 433; *The Utopia,* 16 Fed. 507. Indeed, the "reproduction and depreciation" method as applied by the Circuit

Court of Appeals is contrary to analogous cases decided in other circuits. *The H. F. Dimock, supra; La Normandie,* 58 Fed. 427; *Whitehurst* v. *United States,* 272 Fed. 46; *The J. E. Trudeau,* 54 Fed. 907; *The Samson,* 217 Fed. 344; *The I. C. White,* 295 Fed. 593. The so-called "rate making" cases are somewhat analogous, in so far as a "fair value" is sought as the basis of fixing a reasonable rate for public utilities. *Smyth* v. *Ames,* 169 U. S. 466; *Galveston Electric Co* v. *City of Galveston,* 258 U. S. 388; *The Minnesota Rate Cases, supra; Georgia Ry. & Power Co.* v. *Railway Comm.,* 262 U. S. 625. The same broad rule is also applied in comdemnation proceedings. *Hanson Lumber Co.* v. *United States,* 261 U. S. 581; *United States* v. *New River Collieries Co.,* 262 U. S. 341; *Brooks-Scanlon Co.,* v. *United States,* 265 U. S. 106; *United States* v. *Boston C. C. & N. Y. Canal Co.,* 271 Fed. 877.

Many of the cases reject "reproduction" values, particularly, where, as in the present case, they are founded on transitory and abnormal costs of production. *Mersey Docks and Harbor Board,* 3 K. B. Div. 223, distinguished. Abnormal and transitory values should not control, even where market value is the test. *City of New York* v. *Sage,* 239 U. S. 57; *Reno Co.* v. *Pub. Ser. Comm.,* 298 Fed. 790; *In re Inwood Hill Park,* 189 N. Y. S. 642; *Lawrence* v. *Boston,* 119 Mass. 126; *Brown* v. *Calumet River Ry. Co.* 125 Ill. 600; *Languist* v. *Chicago,* 200 Ill. 69.

The fact that the Proteus was a requisitioned vessel, and that her owner was deprived not only of the power to dispose of her by sale, but of the right to her use, at least until after March 1, 1920, was an important factor in measuring the damage sustained at the time of her loss, and one which the Circuit Court of Appeals plainly disregarded. The courts have recognized that vessels requisitioned because of war conditions suffered thereby a decrease in value to their owners. *The Kia Ora,* 246 Fed. 143; *Harries* v. *Shipping Controller, supra; Shipping Con-*

troller v. *Lloyds Royal Belge, supra. Braceville Coal Co.* v. *People,* 147 Ill. 66; *International News Serv.* v. *Associated Press,* 248 U. S. 215. The original cost of the Proteus, which was less than half of the amount awarded by the Circuit Court of Appeals as measuring her value at the time of the loss, was entirely disregarded as a factor in ascertainment of the measure of the damage. The Proteus was of a special type of construction, which would have operated to reduce her sale value in the open market. That fact was disregarded by the Circuit Court of Appeals. The application of the scale of valuation fixed for vessel property by the Advisory Board of the War Risk Insurance Bureau at the time of her loss, indicates that the Proteus was worth less than $700,000, according to the Advisory Board's scale.

Mr. C. C. Burlingham, with whom *Mr. Van Vechten Veeder* and *Mr. A. Howard Neely* were on the briefs, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

August 19, 1918, the steamship Cushing, owned by the petitioner, Standard Oil Company, and the Proteus, owned by the respondent, Southern Pacific Company, and operated by the Director General of Railroads, collided. The Proteus and her cargo were lost. Petitioner and respondents filed their petitions for limitation of liability. R. S. §§ 4283–4285. Admiralty Rule 54. The proceedings were consolidated. The District Court found that both vessels were at fault and referred the question of damages to a commissioner. 266 Fed. 570. He reported that there should be awarded on account of the loss of the Proteus $750,000, with interest. The report was confirmed and decree entered, November 28, 1922. 285 Fed. 617. Petitioner and Southern Pacific Company appealed; the Director General did not appeal. The petitioner maintained that the Cushing was not at fault and sought reversal on that ground. The Southern Pacific Company contended

that the commissioner's valuation of the Proteus was too low. The Circuit Court of Appeals affirmed the fault of the Cushing and held that the value of the Proteus at the time of the collision was $1,225,000; and the decree of the District Court was modified accordingly. 292 Fed. 560. The petition to this Court for a writ of certiorari alleges that at the time of the collision the Proteus was under the sole control of the Director General of Railroads, and that, if the vessel had not been lost, it would have continued in his control until March 1, 1920; that the claim of the Southern Pacific Company was against the Standard Oil Company and the Director General, who were joint tortfeasors causing the loss of the Proteus, and that, after the expiration of the term of the Circuit Court of Appeals, petitioner learned that a final settlement had been made between the Southern Pacific Company and the Director General, by which the liability of the latter for the loss of the Proteus was satisfied by payment of $750,000 or by adjustment and settlement on that basis. And the petition asserts that thereby any claim of the Southern Pacific Company against petitioner was extinguished, because a settlement with one joint tortfeasor precludes recovery from the other for the same loss. The petition was granted. 263 U. S. 696. Later, the order granting the writ was vacated as to personal injury, cargo and passenger claimants against whom no error was assigned. 263 U. S. 681. By leave of this Court, additional testimony relating to the settlement was taken in accordance with paragraph 2 of rule 12. 265 U. S. 569.

The material facts may be briefly stated. December 28, 1917, the President took over the combined rail and water transportation system of the Southern Pacific Company and its subsidiaries. February 19, 1919, the Director General and the owner made a contract in respect of the operation and upkeep of the properties and for the compensation to be paid for their use during federal control. By it, the Director General was required to pay for

property destroyed and not replaced. December 19, 1922, final settlement under the contract was made. The total amount of all items claimed by the company was $54,252,-694.57. There was paid $9,250,000 as a lump sum; and that was accepted in full satisfaction of all claims, with certain exceptions not here material. The company claimed $1,268,090.26 for the Proteus and $16,663.80 for the lighter Confidence. The Railroad Administration kept a record showing how the lump sum was arrived at. In this record there was allocated on account of the Proteus and the Confidence a lump sum of $885,000, but this was not in any wise communicated to the company. There was no agreement as to the value of the Proteus or as to the amount included in the lump sum on account of her loss or on account of any other item. On the facts disclosed, it is impossible to attribute to her loss any particular amount.

The rule of the common law that one who is injured by a joint tort and accepts satisfaction from one of the wrongdoers cannot recover from the other does not apply. By reason of the immunity of the United States from suit, the Southern Pacific Company did not have the same remedy against the Director General that an owner would have against a private charterer. Waiver of sovereign immunity from suit was not broad enough to permit an action in tort by the company against the Director General for the loss of the Proteus. See § 10, Federal Control Act, c. 25, 40 Stat. 456; *Dupont de Nemours & Co.* v. *Davis,* 264 U. S. 456, 462; *Missouri Pacific R. R.* v. *Ault,* 256 U. S. 554. In respect of that, there was no breach of duty owed to the respondent by the Director General as a common carrier. As was said in *The Western Maid,* 257 U. S. 419, 433, " The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort." At the time of the collision, the Director General was a special owner having exclusive possession and con-

trol of the vessel; the Southern Pacific Company was the owner of the reversion. Together they had full title, and joined in the petition for limitation of liability. Adjustment of their interests under the contract could be made before as well as after the end of litigation. No question of tort or negligence on the part of the Director General was involved. The settlement had no relation to the wrongful act of petitioner and did not affect its liability. *Ridgeway* v. *Sayre Electric Co.*, 258 Pa. 400, 406. Petitioner is not entitled to dismissal as against the Southern Pacific Company. Nor is the Director General bound by the decree of the District Court as to the amount of damages. On appeal in admiralty, there is a trial *de novo*. The whole case was opened in the Circuit Court of Appeals by the appeal of the Southern Pacific Company as much as it would have been if the Director General had also appealed. *Reid* v. *American Express Co.*, 241 U. S. 544; *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21; *The John Twohy*, 255 U. S. 77; *Munson S. S. Line* v. *Miramar S. S. Co.*, 167 Fed. 960. And see *Irvine* v. *The Hesper*, 122 U. S. 256, 266.

It is fundamental in the law of damages that the injured party is entitled to compensation for the loss sustained. Where property is destroyed by wrongful act, the owner is entitled to its money equivalent, and thereby to be put in as good position pecuniarily as if his property had not been destroyed. In case of total loss of a vessel, the measure of damages is its market value, if it has a market value, at the time of destruction. *The Baltimore*, 8 Wall. 377, 385. Where there is no market value such as is established by contemporaneous sales of like property in the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision; that is, the sum that in all proba-

bility would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy. *Brooks-Scanlon Corporation* v. *United States,* 265 U. S. 106, 123. And by numerous decisions of this Court it is firmly established that the cost of reproduction as of the date of valuation constitutes evidence properly to be considered in the ascertainment of value. *Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276, 287, and cases cited; *Bluefield Co.* v. *Public Service Commission,* 262 U. S. 679, 689; *Georgia Ry. & Power Co.* v. *Railroad Commission,* 262 U. S. 625, 629; *Brooks-Scanlon Corporation* v. *United States, supra,* 125; *Ohio Utilities Company* v. *Public Utilities Commission,* 267 U. S. 359. The same rule is applied in England. *In re Mersey Docks and Admiralty Commisisoners* [1920], 3 K. B. 223; *Toronto City Corporation* v. *Toronto Railway Corporation,* [1925] A. C. 177, 191. It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. *Minnesota Rate Cases,* 230 U. S. 352, 434.

The Proteus was a steel passenger and freight steamship, built in 1900 for use in the Southern Pacific Company's service between New York and New Orleans. Her original cost was $557,600. In 1909, she was reboilered and otherwise improved at a cost of $90,000. The evidence shows that she was unusually well kept and in excellent condition for use. The District Court found that in 1917 and 1918, on account of unprecedented demand and a shortage of shipbuilding facilities, the market value of ships was higher than the cost of construction; and also found that in 1918, when the Proteus was lost, the cost of construction was approaching the peak which came some months later. 285 Fed. 619, 620. Respondents

called three witnesses experienced in shipbuilding and familiar with construction costs and value of ships in 1918. Each made an estimate of the cost of reproduction of the Proteus as of the date of the loss. Their estimates were respectively $1,755,450, $1,750,000 and $1,750,000. One of these witnesses and two others called by respondent testified respectively that in 1918 the value of the Proteus was $1,225,000, $1,297,637 and $1,350,000. The petitioner called a mechanical engineer and naval architect connected with its construction department, who testified that the cost of reproduction of the Proteus in 1918 would have been three times its original cost or approximately $1,670,000. It called two other witnesses, who had been members of a government board of appraisers for the determination of just compensation for vessels requisitioned. They expressed the opinion that the cost of reproduction of the Proteus in 1918 would have been two and a half times its original cost or approximately $1,400,000. But they made no detailed estimates. The figures were arrived at by examination of statistics showing labor and material costs. These three witnesses testified respectively that at the time of the loss the value of the ship was $630,000, $650,000 and $611,000.

In view of changed prices, the original cost of the vessel was not useful as a guide to her value when lost. In *The Clyde,* 1 Swabey 23, Doctor Lushington, speaking of what a vessel would fetch in the market, said (p. 24): "In order to ascertain this, there are various species of evidence that may be resorted to—for instance, the value of the vessel when built. But that is only one species of evidence, because the value may furnish a very inferior criterion whereby to ascertain the value at the moment of destruction. The length of time during which the vessel has been used, and the degree of deterioration suffered, will affect the original price at which the vessel was built. But there is another matter infinitely more important than this—known even to the most un-

learned—the constant change which takes place in the market. It is the market price which the Court looks to, and nothing else, as the value of the property. It is an old saying, 'The worth of a thing is the price it will bring.'" And see *City of Winona* v. *Wisconsin-Minnesota Light & Power Co.*, 276 Fed. 996, 1003.

Restitutio in integrum is the leading maxim applied by admiralty courts to ascertain damages resulting from a collision (*The Baltimore, supra,* 385), and on the same principle, value is the measure of compensation in case of total loss. The evidence requires a finding that, as of the date of her loss, the cost of reproduction new of the Proteus was not less than $1,750,000. Ordinarily, contemporaneous cost of construction would be a good indication of the amount of damages resulting from the loss of a new ship. There ought not to be any difference between reasonable original cost and estimated cost of reproduction as of the date when built. But the Proteus was 18 years old when lost, and all the witnesses who testified on the subject fixed her value at that time higher than her original cost and lower than the estimated cost of construction. There is no established method or rule for determining the difference between her value at the time of the loss and what her value would have been if then new. It was shown that annual rates of depreciation used in the accounts of shipowners varied from two and a half to five per cent., and that such rates are affected by the policy of the owners, business conditions, taxes and other things. It was not shown whether such deductions covered annual depreciation resulting notwithstanding proper maintenance, or whether they included all or part of the current cost of upkeep. It did not appear whether the rates were applied to reproduction cost or to original cost, or to an amount remaining after deduction on account of scrap value or salvage value or other minimum. In August, 1918, the immediate demand for ships was greater than the supply; the

shipyards were working to full capacity; wages and prices were high; the trend of construction costs was upward, and the element of time was of the utmost importance. And witnesses on both sides testified that such conditions make for a lower rate of depreciation to be taken into account in determining value. If new, the Proteus would have been worth at least her cost of reproduction. Plainly, conditions in 1918 justified a smaller deduction from cost of reproduction new than before the war, and made value of a vessel in good condition and ready for use approach more nearly its value new.

Petitioner's mechanical engineer arrived at $630,000 by taking 34 per cent. of $1,670,000, reproduction cost as found by him, and by making some relatively small adjustments on account of expenditures for maintenance and improvement. He arrived at 66 per cent. deducted, by taking 4 per cent. for 14 years and two and a half per cent. for four years, making an average of over 3.6 per cent. The two other witnesses called by petitioner arrived at $650,000 and $611,000 respectively, by taking 45.2 per cent. of $1,400,000, reproduction cost found by them, and by making similar adjustments. They arrived at 54.8 per cent. deducted, by the use of a depreciation table prepared by another member of the board of appraisers. This table applies to steel steamers in salt water service. It is based on a life of 40 years. It makes a different deduction for each year. For the first 20 years it takes off 60 per cent. and for the last, 40 per cent. The average annual rate is two and a half per cent. The evidence showed that the useful life of such a vessel is not any fixed number of years, but varies greatly, depending on upkeep and maintenance. The table was intended to reflect average conditions of the different depreciable elements of ships of that class and to guide to average values over extended periods, including times of depression as well as of prosperity. The value fixed by each of petitioner's witnesses is more than $1,000,000 less than the

reproduction cost. The rate of depreciation taken by petitioner's mechanical engineer is too high in view of the conditions prevailing at the time of the loss. The other witnesses based their calculation on a reproduction cost that was too low. Moreover, certain valuations made by the government board of appraisers of which they were members seriously impair the weight of their testimony. In 1917, the United States requisitioned the Havana and the Saratoga, vessels of the same type as the Proteus and about one and a half times its size, and constructed in 1906. Cramps estimated reproduction cost of each in 1917 to be $3,000,000, about three times original cost. The board fixed value at $2,240,000 each, about 74 per cent. of reproduction cost. But the value of the Proteus as given by these witnesses was less than 38 per cent. of her cost of reproduction new.

We think the commissioner and District Court failed to give due regard to construction costs, conditions, wages and prices affecting value in 1918; and that the evidence sustains the decree of the Circuit Court of Appeals.

Decree affirmed.

MR. JUSTICE SUTHERLAND took no part in the hearing or decision of this case.